Supreme Court, U.S.
FILED

952040 MAY 7 1996

OFFICE OF THE CLERK

No. 96-

****

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

****

TSENG FU LIN, d/b/a
ORIENTAL JADE RESTAURANT,

Petitioner

v.

CITY OF GOLDSBORO, FLOYD
McKEEL, Agent, and CHARLES R. SOUTHERLAND,

Respondents

On Petition For A Writ Of Certiorari
To The North Carolina Court of Appeals

****

PETITION FOR WRIT OF CERTIORARI

****

Robert E. Fuller, Jr., Esquire
Counsel of Record
109 North William Street, Suite 4
Goldsboro, North Carolina 27530
(919) 735-7496
Attorney for Petitioner

May 6, 1996

RECEIVED
JUN 17 1996
OFFICE OF THE CLERK
SUPREME COURT, U.S.

40 pp

QUESTIONS PRESENTED

I. WERE THE PETITIONER'S CONSTITUTIONAL RIGHTS VIOLATED WHEN HIS USE OF PROPERTY WAS DENIED, HIS WATER CONNECTION WAS CUT OFF, HIS WATER WORKS WERE SEIZED WITHOUT A WARRANT, HIS LICENSES WERE CONFISCATED WITHOUT CAUSE BY THE CITY OF GOLDSBORO, FLOYD M. McKEEL, AGENT, AND CHARLES R. SOUTHERLAND WITHOUT AFFORDING THE PETITIONER A HEARING? EXCEPTION NO.1 [APP-12]

II. DID THE COURT ERR IN GRANTING THE RESPONDENTS' MOTION FOR SUMMARY JUDGMENT IN INVALIDATING THE CITIZENS'CONSTITUTIONAL RIGHTS, AND THE LAW OF THE UNITED STATES 33 USCS ST. 1251 AND 42 USCS 1983? [APP-12]

REFERENCE OF THIS CASE

Tseng Fu Lin v. City of Goldsboro, et.al, COA 95-657, the N.C. Court of Appeals rendered and filed an opinion on December 19, 1995, requiring a citizen to give up his constitutional protection entirely for Executive Privilege and Immunity. This decision is clearly in contradiction with at least three (3) prior Federal Court of Appeals decisions regarding Executive Privileges and Immunities under USCS Section 1983. The following are submitted as selected cases which are in contradiction:

1. Nelson v. Knox (1958) CA 6 Mich 256 F.2d 312.

2. Gaffiney v. Silk (1973) CA 1 Mass 488 F.2d 1248.

3. Birnbaun v. Trusell (1965) CA 2 N.Y. 347 F.2d 86.

Also please see the following:

1. City of Laudue et.al. v. Margaret P. Gilleo 512 US 129, 36 L. Ed 114 (92-1856).

2. Harlowe v. Fitzgerald (1982) 457 US 800.

3. Youngstown Sheetmetal and Tubing, et.al. v. Sawyer 343 US 579.

The privileges and immunities of the Executive Branch does not necessarily require a citizen to give up his or her constitutional rights. This Court in Harlow v. Fitzgerald, 457 US 800 (1982), ruled in favor of this position.

The ruling in the case at bar by the North Carolina Court of Appeals in upholding the ruling of the lower court arms municiple employees with the power to affect a citizen's livelihood-here the cutting off of water-

anytime they choose. This type of unrestricted activity goes beyond the boundary of the law in 33 USCS Section 1251.

In the instant case, the lower courts invalidated the Constitution and it's Laws, allowing the city employees' judgment to be substituted for the proper agency or agencies opens the door for abuse and the potential sacrifice of the citizen's rights guaranteed by the Equal Protection Clause of the Constitution. This principle; the methods used in enforcing City Ordinances which disregard the rights, integrities, Constitutional guarantees and abandon safeguards for those rights of the citizens; need to be examined and ruled upon by this Court. If this Court does not hear this matter, the reality is that people must live in this great land without the rights to speak

out, to be heard concerning change, to work out whereby they may obey the law and to correct any violations. In his book, The Realm of Law, Albert V. Dicey states at pages 188-195 the following:

"No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in ordinary legal manner before the ordinary Court of the land."

"...No man is above the law. Every man is subject to the ordinary law of the realm."

TABLE OF CASES

Birnbaum v. Trusell, (1965), CA 2 N.Y., 347 F 2nd 86 .....p. iii

Blanchard v. Baker, 8 ME 253 .....p. 18

City of Laudue et al v. Margaret P. Gilleo, 512 US - 129 LED 2nd 36, 114 sct .. pp. iv, 27

Dohany v. Rogers, 281 US 362 74 LED 904 (1930) .....p. 18

Dolan v. City of Tigard, 129 LED 2nd 304 (1994) .....pp. 19, 26

Gaffiney v. Silk, (1973), CA 1 Mass., 488 F 2nd 1248 .....p. iii

Harlow v. Fitzgerald, 457 US 800 (1982) ..... pp. iv, 26

Lucas v. South Carolina Coastal Council, 505 US 120 LED 2nd ..... p. 19

Marbury v. Madison, 1 Granch 137 (1803) .....pp. 24, 27

Metropolitan Water District v. United States, 628 F SUPP 1018 ..... p. 15

New York Times Co. v. United States, 1971, 403, US 713 .....pp. 15, 29

Nelson v. Knox, (1958), CA 6 Mich., 256 F 2nd 312 .....p. iii

New Orleans Waterworks v. Rivers, 29 LED 525.6 St. 273 (1885) ..... pp. 16, 25

Ogden v. Sounders, 12 Wheat 213 ..... p. 28

Oyama v. California, 332 US 633 (1948) . p. 22

Roberts v. New York, 295 US 264 79 LED 1429, Supreme Court, 689 ..... p. 20

Turpin v. Lemon, 187 US 51 47 LED 70.23 Supreme Court 20 (1902) ..... p. 18

United States v. Carolene Product Co., 304 US 144 (1938) .....p. 27

United States v. James Daniel Good Property EL, 126 LED 2nd 490-491 ..... p. 19

Wong Sun v. United States, 371 US 471 (1963) .....p. 20

Youngstown Sheetmetal and Tubing Co. v. Sawyer, 343 US 579 (1952) ..... pp. iv, 25

TABLE OF AUTHORITIES

American Jurisprudence, Volume 26, Eminent Dorman, Section 98 ..... p. 19

American Jurisprudence, Volume 78, Water, Chapter VIII, Section 232, Definition of Water Rights and Privileges .....p. 16

American Jurisprudence, Volume 78, Waterworks and Water Company, Chapter IX, Rules and Regulations of Municipality Supply Water .....p. 16

United States Constitution
Article I, Section 8 .....
..... pp. ii, v, 10, 16
Article IV, Section 2 .....
..... pp. ii, v, 10
Article VI, second sentence .....
..... pp. ii, v, 10, 18, 24
Amendment V ..... pp. ii, v, 11, 26
Amendment IX .....pp. ii, v, 12, 19
Amendment XIV ..... pp. ii, v, 12, 25

Martin Luther King, Jr., August 28, 1963, Washington speech, "I Have a Dream" .... p. 23

33 USCS St. 1251 (a) ..pp. v, 2, 9, 13, 27, 29

33 USCS St. 1251 (b) ..pp. v, 2, 9, 13, 27, 29

33 USCS St. 1251 (d) ..pp. v, 2, 9, 13, 27, 29

33 USCS St. 1251 (g) ..pp. v, 2, 9, 13, 27, 29

The Realm of Law, Albert V. Dicey, 1st Ed., pp. 188 - 195, and p. 1885 ..... p. vi

1994 Clean Water Act .....pp. v, 2, 8, 9, 20

42 USCS, Section 1983 .....pp. iii, 9, 13, 27

STATEMENT OF FACT

Petitioner, Tseng Fu Lin, has owned and operated a restaurant in Goldsboro, North Carolina, since 1976. The restaurant is located on 5.43 acres, and is bordered by U.S. Highway 117 Bypass, 117 Business, along with others and surrounded by other city properties. The building size is 22,400 square feet, one part for the Oriental Jade Restaurant; the other part leased for operation of a grocery store known as the A&P Building.

Sometime in 1990, the City authorized a jail facility to be installed on nearby property. Because some problems developed in association with the City approval of this site, there were many protests from citizens. On March 11, 1991, the sewer line backed up and grievances were aired in public hearings. The City authority blamed the Petitioner as

the cause of the contaminates which affected users further down stream. Since this cause arose under US 33 USCS Section 1251, the Clean Water Protection Law, Pet tioner requested Federal and State Environmental Administrators to investigate what the core of the problem was with an eye to try to improve the situation. After investigation, federal authorities declined to take any action against the Petitioner because the State environmental agency already determined that the Petitioner had complied with the Law by having a Grade A Report [APP-15].

On March 24, 1993, the city plumbing inspector, Mr. John Hales, certified a letter to Petitioner and ordered him to install a grease trap. At that time, the Petitioner was equipped with many devices approved on the record and the certified letter did not state

clearly which building code section the Petitioner had violated. The Petitioner rushed to North Carolina Building Code Enforcement Agency for help. The agency informed the Petitioner of their decisions not to prosecute the violation under state authority [APP-16].

On July 15, 1993, the restaurant experienced an arson fire which the local fire department put out in time. The Petitioner's property sustained limited damage. After the investigation, the Court convicted offender and the City Building Inspection Department issued a permit to repair. There was no structural construction involved, thus limiting the repairs. All of the operations licenses were to remain in effect, and the Petitioner maintained his good standing with all utility services. By November, 1993, all

the repair work had been completed. After inspections, the property was permitted to be used for the same past use. Several days later, Mr. John Hales came over and started taking action to shut off Petitioner's operations at the restaurant and the vacant grocery store, stating that the Petitioner did not comply with his order in the March 1993 letter. Within a week and more specifically on December 1, 1993, the Petitioner filed a petition for variance with the city manager and the city attorney [APP-18].

On December 7, the Petitioner received from the Respondent, Chief Building Inspector Floyd M. McKeel, a certified letter ordering water and electricity to be cut off.

On December 15, the Petitioner's waterworks, lines, gauge valves and meter regulators were confiscated by Respondent,

City Utilities Director Charles R. Southerland and the City of Goldsboro Police Department. Thus, the property's exclusive rights to use had been taken and the privileges and immunities and other constitutional protection were gone like the dust with the wind. After an injunction against the actions of the Respondents was denied by the Wayne County Superior Court, the Petitioner installed the grease trap as specified. The restaurant's water was back on. The grocery store's water was still off. The Petitioner experienced the loss of water works and the property is under a foreclosure sale which Petitioner contends is the result of the Respondent's actions in not allowing him to operate his business. [APP-23].

STATEMENT OF CASE

The Petitioner filed a Complaint on April 20, 1994, asking for damages, both actual and punitive, from the Respondents under the Constitutional protection and for his utilities to be turned back on under the State licensing authority. A preliminary injunction was denied on May 26, 1994 ... [APP-34]. The Respondents filed a counterclaim on June 27, 1994. The Petitioner filed his reply on July 8, 1994. On November 29, 1994,the Respondents filed a Motion for Summary Judgment and was granted such on January 30, 1995, on the basis of governmental immunities [APP-36].

This cause came before the North Carolina Court of Appeals on December 18, 1995. Its opinion was filed on December 19, 1995, affirming the lower court. In affirming the

trial court, the Court finds that the Petitioner is not entitled to the property interest which has constitutional protection.

The Petitioner filed for discretionary review on January 5, 1996, [APP-36]. A certified copy of the record was filed with the North Carolina Supreme Court [APP-54].

After consideration, the discretionary review was denied on February 8, 1996, and an Order was entered in the North Carolina Court of Appeals on February 22, 1996.

GROUND OF PETITION FOR WRIT OF CERTIORARI

On January 30, 1995, the Superior Court of Wayne County, North Carolina, in granting the Respondent's Summary Judgment finds:

A. Under the doctrine of governmental immunities, the Respondents are entitled to

summary judgment. Thereby, the citizen's claim under the Fifth and Fourteenth Amendments for due process and just compensation protection were denied [APP-1]; and

B. The Court expressed concern for due process of law under the procedures used in this case [APP-1].

In affirming the Trial Court, the North Carolina Court of Appeals' opinion filed on December 19, 1995 finds:

A. A municipal corporation is the owner and title holder of clean water. The corporation shall be able to do what ever it sees fit and is not under any scrutiny under the law and constitution [APP-61];

B. The action in removing the Petitioner's rights to water is within a city's official capacity. To bar the Petitioner's claim is justified since the North Carolina Supreme Court decides who is to be under the jurisdiction of constitutional protection [APP-61].

On February 8, 1996, after consideration, the North Carolina Supreme Court voted to deny discretionary review in Chambers. The Petitioner had submitted a brief within the

time, but said brief was not considered. No voting records and opinions were given. The denial of the Petition was entered in the Court of Appeals on February 22, 1996. Thus, the Petitioner exhausted all his remedies in the State Court system [APP-56].

This Petitioner submits to this Court that:

A. Under color of North Carolina Law, North Carolina is requiring citizens to give up rights to clean water under 33 USCS 1251; protection and rights under 42 USCS, Section 1983, and other constitutionally guaranteed rights under the guise of executive privileges and immunities.

B. The decision of the North Carolina Court of Appeals in COA 95-657 is in conflict with the decisions of three United States Courts of Appeals dealing with municipal

officer's immunities under 42 USCS, Section 1983, and this Court's decisions of many cases which will be examined in Arguments I and II.

VERBATIM QUOTATION OF UNITED STATES CONSTITUTION

ARTICLE I SECTION 8 The Congress shall have power: To regulate commerce with foreign nations and around the several states, and with the Indian tribes;

ARTICLE IV SECTION 2 The citizens of each state shall be entitled to all privileges and immunities of citizens in several states;

ARTICLE VI SECOND SENTENCE This Constitution, and laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made,

under the authority of the United States, shall be the supreme law of land; and the judges in every state shall be bound thereby, and things in constitution or laws of and state to the contrary not withstanding;

AMENDMENT V No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces or with militia when in actual service in time of war or public danger; nor shall any person be subject for same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without the due process of

law; nor shall private property be taken for public use without just compensation;

AMENDMENT IX The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage other retain by the people;

AMENDMENT XIV SECTION 1 All persons born or naturalized in the United States, and subject to the jurisdiction, thereof, are citizen of United State and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of United States. Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection

of the law.

CONGRESSIONAL DECLARATION OF GOALS AND POLICY

33 USCS, 1251 (a) Restoration and maintenance of chemical, physical and biological integrity of nations water; national goals for archivement of objective; (b) Congressional recognition, preservation and protection of primary responsibilities and rights of state; (d) Administration of environmental protection agency to administer 33 USCS, 1251; (g) Authority of state over water.

42 USCS, 1983 Civil action for deprivation of rights every person who, under

color of any statute, ordinance, regulation, custom or usage of any state or territory subjects or cause to be subjected, any citizen of United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and Laws shall be liable to the party injured in an action at law, suit in equity, or other proceedings for redress.

ARGUMENTS

I. THE PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN HIS USE OF PROPERTY WAS DENIED WHEN HIS WATER CONNECTION WAS CUT OFF, HIS WATERWORKS WERE SEIZED WITHOUT A WARRANT, HIS PRIVILEGES AND IMMUNITIES WERE CONFISCATED WITHOUT CAUSE BY THE CITY OF GOLDSBORO, FLOYD M. McKEEL, AGENT, AND CHARLES SOUTHERLAND, AGENT, WITHOUT AFFORDING THE PETITIONER A HEARING PRIOR TO SUCH ACTION BEING TAKEN [APP-12].

The water supply is essential for life and property. Therefore, it is a property

right protected in the Ninth Amendment of the United States Constitution. The states hold the ownership and title, although it has granted the right of use to its' citizen on prescribed conditions. In accordance with American Jurisprudence, Volume 78 entitled "Water" in Chapter VIII Section 232, a water right is regarded as property and a vested water right or privilege constitutes property within the meaning and operation of the constitutional guarantees. The position that water rights are under Constitutional Protection is supported in Metropolitan Water District v. United States, 628 F. SUPP 1018 (1985). In the present case, the Petitioner had obtained a grant of water for a commercial venture in February, 1976, under the regulations of the Environmental Health Commission. This category of water for a

commercial venture was without a municiple corporation holding a franchised right. This relationship established a contract which would fall under the commerce clause of the United States Constitution, Article I, Section 8. In New Orleans v. Rivers, 129 L.Ed 525, the Supreme Court has declared monopolies are unconstitutional. Petitioner has paid the water assessment in full when the water problem subject was raised. State and federal agencies were called upon to deal with the cause of the sewer problem and to make a determination of its cause. Even after the investigations, the Petitioner was given a grade "A" sanitation report. The Petitioner was permitted to use the water and sewer system. Therefore, there exists reasons sufficient for the Petitioner to be protected.

American jurisprudence Volume 78, Chapter

IX, Section 69, entitled "Waterworks", states that a municipality in the business of furnishing water to its inhabitants as a private corporation and an ordinance prescribing such regulations has the same force and effect as a by-law of a private corporation whose powers are of like character and conferred for the same purpose. This position has been taken by the high courts of Illinois, Kentucky, New Mexico, Ohio and Virginia. The only restriction upon the power to pass such an ordinance is that it conforms to the laws of the state and are reasonable. The law allows municipalities to furnish water and to make sure that the water is available to its citizens within its boundary. The law even grants municipalities the capacity to invalidate state grant water rights or privileges. However, when a municipality

attempts to invalidate a state license for the use of water before the license expires by use of the violation of another law, such as occupancy, it has been held that that action is not reasonable. Blanchard v. Baker, 8 ME 253. To invalidate the public grant without due process of law is not reasonable and is not legally enforceable. This Court held in Dohang v. Rogers, 281 US 362, 74 L.Ed 904, 50 (1930) 12 and Turpin v. Lemon, 187 US 51 47 L.Ed 70.23, Supreme Court 20 (1902), that when water is cut off and there is a refusal to turn it back on while the Petitioner's license is still in force and no exigencies such as fire or shortage exist, but is used merely to abate an ordinance violation without the limits of constitutional guarantees, then there has been a violation of the Constitution, in particular Article VI, second

sentence. This Court also expressed this view in Dolan v. City of Tigard, 129 L.Ed 2nd 304. With no water or no electricity, Petitioner cannot operate his restaurant. The lease to the grocery store expired, and the property is now in foreclosure. Thus, according to American Jurisprudence, Volume 26, entitled "Eminent Domain", Section 98, the Petitioner was entitled to a due process hearing. Eminent domain is only allows a taking within the guarantees of the Constitution. This Court unanimously ruled so in Lucas v. South Carolina Coastal Council, 505 US 120. Government must afford a due process hearing in eminent domain cases according to United States v. James Daniel Good, el Property, 126 L.Ed 2nd 490-491.

A clean water supply is essential and is protected in the Ninth Amendment of the

Constitution. With the Clean Water Act, authorities must be required to protect it's source and prohibit tampering. A cut-off taken with force, is arbitrary as viewed by this Court in Roberts v. New York, 295 US 264 79 LED 1429, Supreme Court, 689.

The core of the Petitioner's argument is to show to this Court that it is not necessary to require citizens to give up the right to have water upon the discretionary whim of the local authorities of administration upon the pretext of enforcing the law. The right to be heard, to have a lawyer present to present the Petitioner's side and to appeal cannot be circumvented under the Constitutional guarantees. To seize the property, without cause or warrant, is Poison Fruit Tree, as seen in Wong Sun v. United States, 371 US 471 (1963).

II. THE COURT ERRED IN GRANTING THE RESPONDENTS MOTION FOR SUMMARY JUDGMENT IN TAKING THE PETITIONER'S PROPERTY RIGHTS, PRIVILEGES AND IMMUNITIES AND OTHER CONSTITUTIONAL RIGHTS WITHOUT THE FOURTEENTH AMENDMENT DUE PROCESS OF LAW, EQUAL PROTECTION UNDER THE LAW AND THE FIFTH AMENDMENT DUE PROCESS OF LAW AND JUST COMPENSATION [APP-12].

This case came before the Wayne County, North Carolina Superior Court on January 30, 1995. In granting the Respondents Motion for Summary Judgment, the Court found:

a. The actions of the building inspectors issuing a violation order and summarily enforcing the same by cutting off the water supply and refusing to turn back on thus causing losses was not tantamount to a taking which required due process.

b. City government and agents under the doctrine of governmental immunities does not have to afford due process protection to Petitioner.

c. Court had a concern of the right to be heard, but in most cases solved by political process - not by law.

This case went on before North Carolina Court of Appeals on December 18, 1995, without

oral argument. The Court affirmed the trial court's opinion on December 19, 1995. The Court found:

a. The judgment proper in the absence of law and constitution requiring liability.

b. The state holds the water property; the water supply, by the City. Petitioner has no property interest. No due process is required.

And this case went on before the Supreme Court of North Carolina. In conference, after consideration, they denied the Petitioner's Discretionary Review on February 23, 1996. In affirming the trial court, the Court of Appeals made a ruling holding that the Petitioner does not have any property interest and cannot claim due process protection. This ruling is clearly in contradiction with this Court's decision in Oyama v. California, 332 US 633 (1948). This Court declared that every American is entitled to pursue life, liberty,

property and the pursuit of happiness. Dr. Martin Luther King, Jr. once stated "I Have a Dream". So too, Petitioner has a dream to keep the property he had already obtained, to receive and retain the grant from the government, and to be under the protection of the United States Constitution and the law. Petitioner further contends that he is a United States citizen who has paid all his dues. Therefore, he is entitled to have an American Dream.

On January 30, 1995, the Superior Court, in granting the Respondents' Motion for Summary Judgment, made findings in cutting off the Petitioner's water that it was not tantamount to a taking. The Petitioner's contention is that a municipality is required to furnish water, not shut it off. Taking away the Petitioner's water privilege is a

taking. Therefore, the taking should be done under Constitutional mandates. In the Conclusion of Law, under (c), the Honorable Court stated that it had a concern for due process and then stated that most cases are solved by political process, not by law. The Petitioner protests and feels the Honorable Judge of the Superior Court is not expressing a wise view. The United States Constitution is the foundation of the law. The supreme law of the land, in Article VI, second sentence, granting judicial review is a check and balance. The correct view has been already expressed in Marbury v. Madison, 1 Granch 137 (1803) by this Court. Even the Court of Appeals and the Superior Court correctly declared the Constitution protection is absent. The Petitioner is still insisting judicial review is important to insure

domestic tranquility, to secure blessings of liberty to ourselves and our posterity as stated in the Preamble. In this instance case, the Superior Court of Wayne County, North Carolina, finds the actions of the building inspector is a governmental function. A governmental function must be delegated by Legislation. The Fourteenth Amendment, Section One , prohibited legislation to cut off water without due process of law. The Supreme Court of the United States, in 1885, dealt with monopolies under the Constitution. It invalidated the city charter in New Orleans v. Rivers, 29 L.Ed 525, 6 S.Ct 273 (1885). Ordinance law is comparable to a by-law. The use by a private corporation law for a broad claim of immunity shall not be allowed which was enunciated by this Court in Youngstown Sheetmetal and Tubing Co., el v. Sawyer, 343

US 579 (1952). This Court also stated that a violation of law or due process will subject the offending party to a civil action in Harlow v. Fitzgerald, 457 US 800 (1982).

The relation established in the supplying of water service is wholesaler and retailer. The Petitioner paid the assessment in full and all the additional charges associated therewith. The waterline on the Petitioner's property is absolutely at Petitioner's own cost; therefore, the Petitioner shall have the right to exclude the Respondents from cutting off at the Petitioner's property. Thus, the right to exclude from taking shall be retained and protected under the Fifth Amendment (Dolan v. City of Tigard, supra.).

Since the Respondents are a municipal corporation maintaining water for sale, it is liable to the Petitioner for damages and thus

the Motion for Summary Judgment should not have been granted.

Thus, the Respondents are liable under 42 USCS, 1983, City of Laudue et al v. Margaret P. Gilleo, 512 US - 129 LED 2nd 36, 114 sct.

When Chief Justice Stone, in United States v. Carolene Product Co., 304 US 144 (1938), insisted that requiring citizens to give up their constitutional protection is not reasonable, the Court shall be "concerned with power and not the merits of its exercise". Therefore, the lower courts in invalidating the United States Constitution and it's Laws (33 UCSC St. 1251 and 42 USCS 1983), was in error.

SUMMARY

Chief Justice Marshall, in Marbury v.

Madison, 1 Granch 137 (1803), expressed the view of judicial review. He argued that without judicial review, a written constitution would be quite futile as a means of limiting the abuse of government power. For that reason the government power need not deny the Petitioner equal protection under the law and the Constitution.

Under the doctrine of presumption of constitutionality of any written law, Justice Washington outlined in 1827 in Ogden v. Sounders, 12 Wheat 213, requiring Courts and other authorities to presume the legality of legislative principles. Respondent's actions violated the Petitioner's constitutional protection and its guarantees. The officials' conduct and actions are questioned in this controversy. The Petitioner presented this question to the Superior Court.

Unfortunately, the Court mistook this issue by insisting the city ordinance is constitutional and rejecting the Petitioner's claim.

There is no clean water protection law with requirements adopted and imposed in the Respondent's ordinance. Yet, even with 33 USCS 1251, the Petitioner received the above stated results. The Petitioner faced many unusual disappointments. The original questions presented never were heard properly per curiam as expressed in the view of New York Times Co. v. United States, 1971, 403, US 713. Therefore, the Petitioner requests this Honorable Court to invalidate the Respondents' conduct and actions, disregarding the Petitioner's Constitutional protection guaranteed to the people, for the right to pursue a daily livelihood, liberty and the security of property.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted this, the 6th day of May, 1996.

Robert E. Fuller, Jr.
Counsel of Record
109 North William Street, Suite 4
Goldsboro, North Carolina 27530
(919) 735-7496

Attorney for Petitioner,
Tseng Fu Lin, d/b/a Oriental Jade Restaurant

PUBLISHER'S NOTE :

ORIGINAL PAGINATION IS NOT CONTINUOUS.

(2)

Supreme Court, U.S.
FILED

952040 MAY 7 1996

OFFICE OF THE CLERK

No. 96-

****

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

****

TSENG FU LIN, d/b/a
ORIENTAL JADE RESTAURANT,

Petitioner

v.

CITY OF GOLDSBORO, FLOYD
McKEEL, Agent, and CHARLES R. SOUTHERLAND,

Respondents

On Petition For A Writ Of Certiorari
To The North Carolina Court of Appeals

****

APPENDIX

****

Robert E. Fuller, Jr., Esquire
Counsel of Record
109 North William Street, Suite 4
Goldsboro, North Carolina 27530
(919) 735-7496
Attorney for Petitioner

May 6, 1996

106pp

CONTENTS OF APPENDIX

TRANSCRIPT OF THE MOTION ..... APP- 1

RESTAURANT INSPECTIONS ..... APP- 15

LETTER FROM GOVERNOR HUNT ..... APP- 16

AFFIDAVIT ..... APP- 18

NOTICE OF SALE ..... APP- 23

ORDER DENYING PRELIMINARY INJUNCTION . APP- 34

PETITION FOR DISCRETIONARY REVIEW .... APP- 36

LETTER TO DAVID BRANTLEY ..... APP- 54

ORDER, CLERK JOHN H. CONNELL ..... APP- 56

ORDER, JUDGE ORR ..... APP- 59

APPEAL BY PLAINTIFF FROM SUMMARY JUDGMENT ORDER ..... APP- 61

MOTION FOR PRELIMINARY INJUNCTION .... APP- 72

CIVIL SUMMONS ..... APP- 74

COMPLAINT ..... APP- 76

ORGANIZATION OF TRIAL TRIBUNAL ..... APP- 81

LETTER FROM JOHN N. HALES ..... APP- 82

LETTERS FROM FLOYD M. McKEEL ..... APP- 85

NOTICE OF APPEAL ..... APP- 91

ORDER, W. OSMOND SMITH ..... APP- 95

ASSIGNMENT OF ERROR ..... APP- 97

CERTIFICATE OF SERVICE OF PROPOSED RECORD ON APPEAL ..... APP- 98

SETTLEMENT OF RECORD ON APPEAL APP-100

NAMES AND ADDRESSES OF COUNSEL APP-101

CERTIFICATE OF SERVICE OF RECORD ON APPEAL APP-102

STATE OF NORTH CAROLINA	IN THE GENERAL COUNTY OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF WAYNE	FILE NO. 94 CVS 860
TSENG FU LIN d/b/a ORIENTAL JADE RESTAURANT	TRANSCRIPT
VS	OF THE
CITY OF GOLDSBORO, FLOYD McKEEL AND CHARLES SOUTHERLAND	MOTION

APPEARANCES

PLAINTIFF: ROBERT FULLER
Attorney at Law
Goldsboro, NC

DEFENDANT: ASH SMITH
Attorney at Law
Goldsboro, NC

This matter came on for trial before the Honorable Russell Lanier, Jr., Superior Court Judge Presiding at the January 30, 1995 Civil Session of Superior Court for Wayne County, North Carolina.

The following proceedings were had, to wit:

THE COURT: Okay. This is defendant's motion for summary judgment and you say the appeal was dismissed?

MR. FULLER: Your Honor, I filed it with Mrs. Crumpler this morning. I have not had a chance to serve it --

THE COURT: Okay.

MR. FULLER: -- upon Mr. Smith.

THE COURT: Okay. So what are we here to hear?

MR. SMITH: Your Honor, we have, we also filed a motion for sanctions as a part of that motion to dismiss the appeal and we have a motion for summary judgment and I can just proceed with the motion for summary judgment and just address the issue of --

THE COURT: Okay. Well now, if the appeal has been dismissed, what jurisdiction do I have over anything else?

MR. SMITH: It was an appeal from a preliminary injunction, Your Honor. So the case is not, the case in chief has not been disposed of by trial or prior summary judgment motions, Your Honor.

THE COURT: Okay. Well, what are we talking about?

MR. SMITH: Your Honor, this, the plaintiff Mr. Lin owns a restaurant at 2102 North 117 Bypass entitled the Oriental jade Restaurant and the facts reveal that on

September 20, 1991 and March 24, 1993, city sewer crews responded to the sewer line in the vicinity of the Oriental Jade and cleared out the backed up sewer, clogged up with grease contaminating people down stream. Oriental Jade is the first customer on the sewer line at that point and grease was right at the junction of the pipe coming into the main line. There was nobody down man from him so the grease had to come from his restaurant. By letter dated March 31, 1992 from John Hast (? Spelling), the mechanical inspector with the City of Goldsboro, he notified Mr. Lin that he was going to have to install a grease interceptor. Sometime after March 31st there was a fire at the Oriental Jade. It was closed for repairs. A fire damaged the building. They could not have a water permit but temporary water permit was issued for the purpose of repairs. The members of the City Inspections Department kept going by the building because they were going to have to approve it for repairs to be released. As part of that they kept checking on the grease interceptor. It was never installed. They kept verbally advising. By certified letter dated December 3, 1993, Chief Building Inspector notified Mr. Lin again he was going to have to install a grease interceptor. Both of those letters are attached to the defendant's answer as Exhibits A and B. Mr. Lin did not install the grease

interceptor so by letter dated December 15, 1993 Mr. McKeel, Chief Building Inspector at the time who has since retired and is named defendant in this action, Your Honor, notified Mr. Lin that water service to his business was being terminated. It was only a temporary permit for purposes of repair and that permanent water would not be authorized until the interceptor was installed. So Mr. McKeel did not order the closing of his business as alleged in the complaint. It was not, you know, it was not open for business at the time. It was closed for repairs, Your Honor.

THE COURT: Okay.

MR. SMITH: Mr. Lin filed this suit April 20, 1994 alleging that his right to due process had been violated. Basically, Your Honor, that Mr. McKeel, that's paragraph 8 of the complaint, had ordered the closing of his business without notice and opportunity to be heard. We, of course, answered and denied that and maintain our two letters A and B were notice. Mr. Lin asked for preliminary injunction. That was denied. He gave notice of appeal. The appeal was never perfected and Mr. Lin, Judge, subsequently installed the grease interceptor. We granted him a water permit. He is now open for business, Your Honor. The appeal is technically moot but no one, the appeal was not withdrawn and not perfected. If I

could approach I have a case called Higgins vs. Town of China Grove and I have the statute and code of ordinances if I could approach.

THE COURT: Familiar with the case. As a matter of fact approach the bench.

Discussion at the bench.

MR. SMITH: Your Honor, the motions filed were to dismiss the appeal, more for sanctions because of the time that the attorney for City engaged in researching and preparing the motion. I filed an affidavit showing the amount of time specifically addressed to just filing the motion, Your Honor, and Mr. Fuller has stated he has filed a dismissal of the appeal. I have not seen a copy of that yet, Your Honor.

THE COURT: It is here.

MR. SMITH: Given the facts of Higgins vs. China Grove, we would, you known, ask that the Court in accepting Mr. Fuller's dismissal award the City damages as sanctions for time spent preparing for the motion to dismiss appeal, Your Honor, and turning to the motion for summary judgment, Your Honor, I don't believe that Mr. Lin would dispute the fact that he received those two letters. We have maintained that those provided him notice and if, I don't know if Your Honor will want to look at all of the statutes that I submitted. I submitted Section 168

section 174, 175 because that's the general ordinance making power of a city, it gives them the right to prohibit conditions detrimental to the health and safety of its citizens. Section 175, of course, is the right, the right to enforce those ordinances, the power to do so. Section 143-139 and ordinance 133-141 authorize municipalities to enforce a North Carolina building code and to maintain an inspection again for those purposes, Your Honor, and this photocopy, Your Honor, is the Section 801-4 of the North Carolina State Plumbing Code, Volume 2. 801.4 and it states, Your Honor, a grease interceptor shall be, interceptor shall be installed leading from --

THE COURT: Y'all incorporate this by reference in your order?

MR. SMITH: I mentioned it in, let's see, our fourth defense, paragraph 9 of the answer and would ask Your Honor to take judicial notice these statutes do apply, do govern the proceedings before Your Honor.

THE COURT: Okay. Now the only, what power is there in your Goldsboro Code?

MR. SMITH: That's my next, my next two things, Your Honor, and I submitted this photocopy of the

Goldsboro City Ordinances, Section 25-37 says, All water and sewer services shall be specified, as specified in the North Carolina Plumbing Code, Volume 2 and as approved by the inspector. I tried to highlight that on the copy for Your Honor. Finally, Your Honor, Section 25-35 on the facing page, no interested party shall have a claim for damage in consequence of such permit being revoked or annulled. In this case Mr. Lin's permit for temporary water for the purposes of his repairs had been completed because his repairs, except for the installation of grease interceptor, had been completed. His permit for temporary water was revoked and he had been notified for some known months that permanent water service would not be authorized until he installed the grease interceptor, Your Honor, and, Your Honor, that is our argument for summary judgment. We don't believe that there are any facts in dispute in regard to Mr. Lin getting notice. He has installed the grease interceptor now. His claim basically is that the --

THE COURT: Okay. Well, what about his opportunity to be heard, you know, due process has got two prongs. First, notice and particular opportunity to, to be heard. What -- now in Beaulaville all they do is go to the town board meeting and say what they want to. What do they do in Goldsboro?

MR. SMITH: Your Honor, there is no specific procedure under the Goldsboro Ordinance to go to anyone other than inspections department and inspections department was in constant communication with Mr. Lin for the nine months.

THE COURT: Assume somebody is disgusted with what the inspector says. Where do they go from there?

MR. SMITH: Often referred to the city manager and he will address their concern and, issue a letter.

THE COURT: I mean surely there is something that delineates what authority your inspector has and what --

MR. SMITH: Well, that, that authority I think, Your Honor, would be delineated by the State Statute 168.

THE COURT: That's not what I am talking about. I know he has the authority. What I am saying is somewhere, every time that an employee of a municipality or someone is given certain authority, there is also a check or a balance on the indiscriminate and arbitrary use of that which is by means of somebody that you go to above this guy.

MR. SMITH: Yes, Your Honor.

THE COURT: Okay. You know, all appeals, I mean is there a process for appeal of a rule of your building inspector?

MR. SMITH: No, Your Honor. I do not believe

there is.

THE COURT: Okay.

MR. SMITH: That would be the City's showing, Your Honor, in regard to the motion for summary judgment.

THE COURT: Okay.

MR. FULLER: Your Honor, may it please the Court, this gentleman, as previously stated, is owner of a business here in Goldsboro, the Oriental Jade, which is a restaurant here in town. It has been in business in the City of Goldsboro for over 18 years now and Mr. Lin here is the owner of the building. Up until the fire in which he was forced to do some restructuring there had never been any problems out there and even the letters Mr. Smith had referred to in March of '93 said by their own people, I do not know how the grease is getting through. That they are blaming this man for something that he obviously may or may not have caused but I think that again is a question of fact to be determined. Secondly, as the Court has already pointed out, this is the only so-called appeal procedure that is established in this, in apparently the Goldsboro Code of Ordinances as to how to get this remedy corrected by in fact you are in violation of the code. We would contend and our evidence would show he is not in violation of the code. He has not been in violation for eighteen years. That without the due process here that he

was given no voice or any opportunity to be heard in this matter, Your Honor. The, I think all of us are very much aware of the Constitution and the route to be heard. In this case this is the only right to be heard concerning this matter. In fact whether he was entitled to continue operating as he had in the past for the last eighteen years, if anything, Your Honor, he would have been grandfathered under any kind of ordinances that were subsequently passed at this point because he had been in business. The grease trap had been approved previously. Apparently when he opened, inspections are done, records are maintained, reports are filed and apparently at that point he was, he was, he was completely in compliance and we would content continued to be. Now a grease problem apparently developed at some point in time in that area but my client was blamed for it. Well, this is, this is a business area and other businesses are there in the area and cannot categorically say this was the only business that caused the problem.

THE COURT: Normally you can stick one of them snakes right down that sewer line it has a little camera on it and you can see the build-up of grease leading from various, you know places. Now whether they did this or not, I don't know but now my next question to you, do you contend that this is a proprietary or

governmental function, the providing of the sewage system of the City?

MR. FULLER: Your Honor, I think it is a governmental function.

THE COURT: Okay. Well they have immunity on those.

MR. FULLER: Well, Your Honor, this man's business has been affected and apparently, and apparently was, was translated from governmental function to proprietary function because of the fact they were forcing him, you know, you don't have the grease trap, no water. You are out of business and they translate it into a proprietary interest, into him, he is going to be responsible for installing the grease trap.

THE COURT: The distinction I was trying to make is a governmental function is one that's directly related to the health and welfare and service to the people. Proprietary normally is something making, say you own all the buildings and are renting them out. It appears to me this is governmental and did y'all raise an immunity?

MR. SMITH: We raised immunity issue as our first defense, Your Honor.

THE COURT: Okay.

MR. SMITH: As our second defense we raised the issue of qualified immunity for Mr. Floyd McKeel and Mr.

Charles Southerland, who were sued individually or it says as agent. They have both since retired from the City, Your Honor.

THE COURT: Okay.

MR. SMITH: And we would, as part of our answer, we move that they be dismissed. That motion is not necessarily that it be dismissed as to those two individuals. That motion is not necessarily on for today's calendar.

MR. FULLER: Your Honor, under the statute as they stand and as I understand what's going on here, there is no right to appeal. If the government says you have to do it, you have to do it and is that what you are --

THE COURT: No, what I am saying is the government has the right to establish reasonable rules and regulations for the use of governmental functions which is water, sewer, you know. The only thing that really concerns me about this is the aspect of what he does if he doesn't like what the building inspector has said. Now most people would go right straight to the town board and, you know, I think that you have a political method of handling this. I assume he has not done this. I think you have an immunity problem. You can't hurt them. I am going to have to allow his motion for summary judgment. I don't think you have anything based on immunity. Now

maybe the Court of Appeals will say something else.

MR. FULLER: Okay, Your Honor. Thank you.

STATE OF NORTH CAROLINA
COUNTY OF WAYNE

CERTIFICATE

This is to certify that the forgoing transcript is a true and accurate transcription of the proceedings taken at the January 30, 1995 Civil Session of the Superior Court, taken by me and transcribed by me personally.

Further, that this transcript was delivered to defendant's counsel by hand delivery.

This the 17th day of May, 1995.

"s/Billie Carole Grady"
Billy Carole Grady
Superior Court Reporter

N.C. Department of Environment, Health and Natural Resources
Division of Environmental Health
INSPECTION OF RESTAURANT OR
OTHER FOODHANDLING ESTABLISHMENT

SCORE: 92.5

Health Department: Wayne

Status Code: A

Identification Number: 06096010128

Date of Inspection or Change: 04/04/96

Name of Establishment: Oriental Jade

Street Address: 2102 N. William St.

City: Goldsboro

State: NC

Zip: 27530

Inspection Conducted by: Karen B. Cox

EHS I.D.#: 1183

1988: 91.5% A

1989: 92.5% A

1990: 92.5% A

1991: 90.0% A

1995: A

STATE OF NORTH CAROLINA
OFFICE OF THE GOVERNOR
RALEIGH 27603-8001

JAMES B. HUNT JR.
GOVERNOR

December9,
1993

Mr. Tseng Fu Lin
2102 North US 117 Bypass
Goldsboro, NC 27530

Dear Mr. Lin:

I'm sorry to learn your restaurant was damaged by fire. I sincerely hope you will soon be able to reopen.

A member of my staff has discussed your situation with the North Carolina Department of Insurance. It is my understanding that the DOI's Lee Hauser sent you a letter dated December 3, informing you that if the local inspection department is using the North Carolina State Building Code as the basis for requiring you to install a grease trap on your

sewer line, you should ask them to identify the requirement. The DOI can then render a decision on whether or not the local inspection department has acted appropriately.

It may be that a local ordinance is being used as the basis for requiring you to install a grease trap. Your letter was unclear on that point.

I hope this matter is resolved in a satisfactory manner.

My warmest personal regard.

Sincerely,
"s/JamesB.
Hunt Jr."

James B.
Hunt, Jr.

JBH/acp

AFFIDAVIT

NOTICE OF STATEMENTS AND INQUIRY

WHERE OF: The alleged N.C. Building Code violation without a

grease trap; UNFOUND

WHERE OF: This citizen who is being made to pay off the NAACP is resisting. Notice here given to the Honorable City Manager and City Attorney, City of Goldsboro, North Carolina.

TAKE THIS NOTICE: The alleged ground(s) of such Building code violation laid upon this citizen and property owner either, does not exist or has been eliminated, this citizen TSENG FU LIN, pursuant to North Carolina General Status 143-140, 160-139, 163-365. And NC Building Code Council, Building Code Volume 1-A, Section III, VIII, X, N.C. Department of Insurance, Engineer's Division, and Building Code Enforcement Agent Mr. Houser's interpretation of North Carolina Building

Code, the alleged grounds of Building Code violation - UNFOUND.

Your Plumbing Inspector, Department of Inspection: Order and action, "Install the grease trap or I will shut your business down."

I am contesting pursuant N.C.G.S. 160-200 (41); 160-237; 143-138 (d)(e); Hereto this Notice entering your record and make a note: ORDER has given to this citizen of no grounds stated; specified status procedure disobeyed; no document incorporated or even mentioned ACTION TAKEN: Override authorities and veto the interpretations of the ordinance from the City Attorney on November 12, the conclusion from another inspector on November 15, and an interpretation from the office of NC Building Code Enforcement Agency CAN NOT BE JUSTIFIED. The order and action is based on no legal

ground, veto and override the authorities who are making this citizen pay off the N.A.A.C.P., documented in the City Attorney's office and pending the decision from the N.C. Court of Appeals. Therefore, is RESISTING.

In publishing this Notice, this citizen obtains an affidavit from the Court of Justice and concluded within the United States' Constitutional First Amendment; the freedom of speech; The Fifth Amendment of due process and the property owner's rights deem legally sufficient to serve this Notice by the United States' Postal Service; postage paid and obtain an inquiry from the City of Goldsboro.

WHEREOF: Your Plumbing Inspector contended city authority was behind the July 15 burning of my property given in a statement on November 22, 1993: "This fire can not burn you down I will."

This citizen of North Carolina is informed that arson is a crime. Understanding that the person responsible for the July 15, 1993 who set up the fire is being charged and persecuted.

Under the fire, I demanded to know WHAT WERE THE LEGAL GROUNDS OF THE CITY AUTHORITIES WHO SENT SOMEONE TO BURN MY PROPERTY and threatens to do it again? Thus an inquiry is required.

Upon this day 1 month 12 year 93 and the best of my knowledge.

Signed,

"s/Tseng Fu Lin"

Tseng Fu Lin

2102 N. US 117 Bypass

Goldsboro, NC 27530

Sworn and subscribed

"s/Diane Morris"

Copys:

NC Governor's Office

Governor, Your Honor

NC Dept. of Justice

Attorney General, Your Honor

NC Dept. of Insurance c/o Mr. Houser

FILED: May 9, 1996, 11:20 a.m.. Wayne County, Clerk of Superior Court, Goldsboro, North Carolina

NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION

WAYNE COUNTY FILE NO.: 95-SP-169

IN THE MATTER OF THE FORECLOSURE OF THE DEED OF TRUST DATED JANUARY 2, 1990, FROM TSENG-FU LIN AND WIFE, NOTICE OF SALE WHI LIN LIN, AND KUO-TSUN, WANG AND WIFE, TSENG HSUEH-MIAN, WANG, TO JOHN W. DEES, TRUSTEE AND RECORDED IN BOOK 1251, PAGE 584, WAYNE COUNTY REGISTRY.

Under and by virtue of the power of sale contained in a certain deed of trust executed

by Tseng-Fu Lin and wife, Whi Lin Lin, and Kuo-Tsun, Wang and wife, Tseng Hsueh-Mian, Wang, and recorded in Book 1251, at Page 84, in the Wayne County Registry, North Carolina, and pursuant to the orders of the Clerk of Superior Court of Wayne County, dated august 25, 1995, and of Hon. Clifton W. Everett, Jr., Superior Court Judge, dated October 9, 1995, default having been made in the payment of the indebtedness thereby secured, and said deed of trust being by the terms thereof subject to foreclosure and request for foreclosure having been made by the holder of said indebtedness, the undersigned Trustee will offer for sale at public auction, to the highest bidder for cash, at the Courthouse door in Goldsboro, North Carolina, at 12:00 noon on May 30, 1996, the property conveyed in said deed of trust, the said lot or parcel of land situated in the

City of Goldsboro, Goldsboro Township, Wayne County, North Carolina, and more particularly described as follows:

BEGINNING at a concrete monument on the Western right of way of North William Street, said beginning point being Guy Best's most Southeastern property corner as shown by deed recorded in Deed Book 905, Page 65 in the Wayne County Registry; thence from the beginning leaving the Western right of way of North William Street with the line of the Guy Best property, N. 83° 11' 00" W. 162.40 feet to an iron stake, Guy Best's most Southwestern property corner; thence with the line of the Guy Best property, N 10° 25' 00" E. 41.00 feet to an iron stake found, Guy Best's most Northwestern property corner as shown by deed recorded in Deed Book 905, Page 65 in the Wayne County Registry; thence with

the line of the Guy Best property, N. 89° 53' 00" W. 47.50 feet to an iron stake, Guy Best's most Southwestern property corner as shown by deed recorded in Deed Book 457, Page 14 in the Wayne County Registry; thence with the line of the Guy Best property N. 00° 07' 00" E. 232.10 feet to an iron stake, Guy Best's most Northwestern property corner as shown by deed recorded in Deed Book 457, Page 14 in the Wayne County Registry; thence with the line of the Guy Best property, N. 89° 53' 00" W. 37.80 feet to an iron stake, Guy Best's most Southwestern property corner as shown be deed recorded in Deed Book 833, Page 339 in the Wayne County Registry; thence with the line of the Guy Best property, N. 4° 13' 00" E. 217.20 feet to an iron stake on the Southern right of way of U.S. Highway No. 117, Guy Best's most Northwestern property corner; thence with the

Southern right of way of U.S. Highway No. 117, N. 86° 07' 11" W. 40.19 feet to a concrete right of way monument; thence along a curve to the left (a chord), S. 72° 22' 49" W. 121.18 feet to a concrete right of way monument; thence with the Southern right of way of U.S. Highway No. 117, S. 43° 40' 36" W. 385.14 feet to a concrete right of way monument, Charles V. Marsalis' most Northwestern property corner as shown by deed recorded in Deed Book 1056, Page 51 in the Wayne County Registry; thence leaving the Eastern right of way of U.S. Highway No. 117 with and beyond the line of the property of Charles V. Marsalis, and to and with the line of the property of the City of Goldsboro, S. 40° 55' 55" E. 321.29 feet to an iron stake; thence continuing and with the line of the property of the City of Goldsboro, S. 40° 55' 55" E. 327.91 feet to an iron

stake, the most Southeastern corner of the property of the City of Goldsboro as shown by deed recorded in Deed Book 978, Page 275 in the Wayne County Registry, and B.R. Ward's most Southwestern property corner as shown by deed recorded in Deed Book 881, Page 321 in the Wayne County Registry; thence with the line of the property of B.R. Ward, N. 10° 25' 00" E. 130.24 feet to an iron stake, B.R. Ward's most Northwestern property corner; thence with the line of the property of B.R. Ward, S. 83° 11' 00" E. 199.00 feet to a concrete monument on the Western right of way of North William Street, B.R. Ward's most Northeastern property corner; thence with the Western right of way of North William Street, N. 00° 40' 00" W. 74.23 feet to an iron stake; thence continuing and with the Western right of way of North William Street, N. 00° 40' 00"

W. 51.80 feet to an iron stake; thence continuing and with said right of way, N. 00° 40' 00" W. 64.00 feet to a concrete monument on the Western right of way of North William Street, Guy Best's most Southeastern property corner as shown by deed recorded in Deed Book 905, Page 65 in the Wayne County Registry, the point of beginning containing 236,568 Square Feet or 5.431 Acres more or less.

The above land will be sold subject to 1995 taxes.

The highest bidder at the sale will be required to past a cash deposit of ten (10%) percent of the first $1,000.00 of the bid plus five (5%) percent of the excess of the bid.

DATE: May 9, 1996

"s/John W. Dees"

John W. Dees, Trustee

P.O. Drawer 8

100 N. William Street
Goldsboro, NC 27533-0008
Tele: (919) 735-8311

DEES, SMITH, POWELL, JARRETT, DEES & JONES

ATTORNEYS AT LAW

100 NORTH WILLIAM STREET

GOLDSBORO, NORTH CAROLINA 27530

FAX (919) 735-0234

TELEPHONE

(919) 735-8311

May 9, 1996

Mr. Robert E. Fuller, Jr.

Attorney at Law

P.O. Box 1121

Goldsboro, NC 27533-1121

Re: Lin Foreclosure, 95-SP-169

Dear Bob:

I advised you verbally earlier this week that I was postponing the sale set for May 15, 1996.

The sale is now set for Thursday, May 30, 1996 at 12:00 noon. A copy of the Notice of

Sale is enclosed.

Yours truly,

"s/John"

John W. Dees

Trustee

JWD:rs

Enclosure

copy: Mr. Jonathan Williams

NORTH CAROLINA IN THE

GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

WAYNE COUNTY FILE NO. 94 CVS 860

TSENG FU LIN, d/b/a

ORIENTAL JADE RESTAURANT,

Plaintiff

vs ORDER

DENYING PRELIMINARY

INJUNCTION

CITY OF GOLDSBORO, FLOYD M. McKEEL,

Agent, and CHARLES R. SOUTHERLAND,

Agent, Defendants

This matter having come on for hearing on May 26, 1994, on Plaintiff's application for Preliminary Injunction, and the Plaintiff being represented by Robert E. Fuller, Jr., and the Defendant being represented by L.

Ashley Smith, and the parties agreeing and stipulating in open Court that this Order could be signed out of session and out of district, and the Court having heard the arguments of counsel, the Court finds that the application for Plaintiff, Tseng Fu Lin d/b/a Oriental Jade Restaurant, for Preliminary Injunction should be DENIED.

NOW, THEREFORE, IT IS ORDERED ADJUDGED AND DECREED that Plaintiff's application for Preliminary Injunction be and the same is hereby denied.

ENTERED this the 26th day of May, 1994.

Signed this the 3rd day of June, 1994.

"s/James C. Spencer"

James C. Spencer

Judge Presiding

FILED: January 5, 1996 In the Office of Clerk of Supreme Court of North Carolina

No. 5P96

EIGHT-B DISTRICT

SUPREME COURT OF NORTH CAROLINA

TSENG FU LIN d/b/a	)	
ORIENTAL JADE RESTAURANT	)	
	)	
v	)	From
	)	Wayne
	)	
CITY OF GOLDSBORO, FLOYD M.	)	
McKEEL, AGENT, and CHARLES R.	)	
SOUTHERLAND, AGENT	)	

PETITION FOR DISCRETIONARY REVIEW

UNDER G.S. 7A-31

(Filed 5 January 1996)

TO THE HONORABLE SUPREME COURT OF NORTH

The Petitioner in this action, Tseng Fu Lin, Pursuant to Rule 15 of the North Carolina Rules of Appellate Procedure and N.C.G.S. Section 7A-31(c) respectfully petitions the Supreme Court of North Carolina to review the decision of North Carolina Court of Appeals filed therein on December 19, 1995, Case No. COA95-657. A copy of the opinion of North Carolina Court of Appeals is attached hereto.

The grounds of this petition are as follows:

1. This case involves legal principals of major significance to the jurisprudence of the State and Nation, and

2. The decision of the Court of Appeals appears likely to be in conflict with the decisions of the Supreme Court of North Carolina, Supreme Court of the United States and the Court of Appeals of North Carolina is

likely in error.

FACTS

This case originated as a result of the actions of the City of Goldsboro. Chief Building Inspector issuing an order to cut off the water and electricity on December 7, 1993, because of Building Code violation of not having a grease trap installed. The utility director Charles R. Southerland, cut off water at 12:00 p.m. on December 16, 1993. The City of Goldsboro provided the opportunity. Petitioner filed the underlying action for damages incurred when he was forced to close the restaurant due to being denied access to city water, and a permit to dig a well. He contended that his Constitutional Rights were violated and asked for Actual and punitive damages.

Defendants raised the affirmative

defenses of Governmental Immunity and Qualified Immunity. On November 29, 1994, defendants moved for Summary judgment which was allowed. Petitioner appealed to the North Carolina Court of Appeals by written opinion filed on December 19, 1995.

REASONS THAT CERTIFICATION SHOULD BE ISSUED

1. Legal Principles of Major Significance To The Jurisprudence Of The State And Of the Nation. A reading of the entire whole record in this case and decision of the Court of Appeals reveal that defendants exercised their Police Power in disregard of the law protecting people and liberty guaranteed to the people. Petitioner did not know what would be next. Petitioner contends that defendant, Floyd M. McKeel, was a chief building inspector and an agent acting in a role of governmental capacity with a duty of

written law to discharge in accordance with the City Code.

The petitioner contends that chief building inspector was limited to a narrow issue prescribed by the zoning ordinance and the N.C. Building Code which the city had adopted and that he should uphold the law and constitution to which he had sworn prior to taking office.

At that time, defendant McKeel knowingly issued an order to cut off the Petitioner's water and electricity.

a. He failed to obey and follow-up N.C.G.S. 160A-428, 160A-429, 160A-430 N.C. Statute Prescribed Due Process Procedure Requirements.

b. There was no exigent situation declared by State, Nation, County and City and the law and constitution were available.

c. There was not a court order pending for an action.

d. There is no water cut off subscribed appearing in City of Goldsboro ordinance except non-payment taxation.

e. The petitioner was in good standing with connection of electricity from CP&L and water service from City of Goldsboro.

Petitioner also contends defendant, Charles R. Southerland, knowingly took action that:

a. Water supply by city is for sale.

b. Petitioner is a customer and consumer.

c. Cutting off water will result in some damages to lives and property and can result in unlawful means to control business by the government toward monopoly.

d. He had not received order from his superior.

e. He did not give any written notice prior to taking this action.

The petitioner contends in this petition that water supply is essential depending heavily to the valuable service which in order to acquire, it must be willing to pay for it. Petitioner contends that he had established good standing since February, 1976.

The petitioner contends, and the records bear out, that water to drink, electricity to heat up during mid-winter (especially during Christmas) being cut off resulted in heavy damages and took its toll on the Petitioner's business.

The petitioner further contends, and the record bears out, this contention that the founding fathers at the Constitutional

Convention; i.e., delegates: the Honorable Blount, Honorable Spaight and Honorable Williamson had insisted that Bill of Rights must be in writing and adopted with our constitution within its adoption in September 17, 1787, or pull out.

The Petitioner contends, and the record bears out, that our legislators insisted freedom in writing in the First Article, freedom is first.

The building inspector claimed that petitioner violated the law and must reroute entire system, water system, and electrical system of 5.43 acres of land. This raised an issue of bankruptcy. The Inspector did not allow the petitioner to face the accuser to defend his innocence, to work out, to appeal or to beg mercy. Then a corporate executive mandated cutting off water, forgetting there

is a contract of American Dream. Petitioner contends that the city maintaining water for sale is a privately owned corporation. That once allowed to claim governmental immunity means that in its control, it can unlawfully establish a monopoly prohibited in current law.

Further and at utmost, petitioner is imploring this Honorable Supreme Court of North Carolina and Honorable Justices to come out to address this daily livelihood issue. And further to secure the blessings of liberty to ourselves and our posterity as in the Preamble. This is a legal principle of major significance to the jurisprudence of the State of the Nation, the concept of which is as follows:

a. No man is punishable or can be lawfully made to suffer in body or goods

except for a distinct breach of law established in the ordinary legal manner before the ordinary court of the land.

b. . . . No man is above the law . . . Every man is subject to the ordinary law of realm (Albert v. Dicey, Ist. Ed. pp. 188-95, Dicey Book, 1885).

2. Conflict With Decisions Of Supreme Court Of United States, Conflict With Decision Of Supreme Court Of North Carolina And Decision Of Appeals Is Likely In Error.

The decision of the Court of Appeals of North Carolina appears likely to be in conflict with the decisions of Supreme Court of United States and the Supreme Court of North Carolina, and the decision of the Court of Appeals is likely in error as authority enunciated in these case:

a. U.S. v. James Daniel Good el

Property 126 L.E.D. 2nd 490-491 (1993)

b. Lucas v. South Carolina Coastal Council 505 US 120 L.E.D. 2nd (1991)

c. Youngstown Sheet Metal el v. Sawyer 343 US 579 (1952)

d. Harlowe v. Fitzgerald (1982)

e. Moseller v. City of Ashville 147 S.E. 2nd 558, 267 NC 104.20. ALR 3rd 1286 (1966)

f. Bowling v. City of Oxford 148 S.E. 2nd 624, 267 NC 552.

Upon a reading in the Court of Appeals offering an opinion (alternated) in Lin case the basis of its decision likely an assumption that disconnection of water by governmental capacity is limited because the N.C. Building Code prescribed a duty of building inspector to use due process and just compensation according to the Fifth Amendment of the U.S.

Constitution. It is a general rule which has been enunciated in the law of the North Carolina Supreme Court in McNeill v. Harnett County, 327 NC 552, 398 S.E. 2nd 475 (1990). This stare decision is in contradiction with Moseller v. City of Ashville, 147 S.E. 2nd 558, 267 NC 104.20 A.L.R. 3rd 1286 (1966) and Bowling v. City of Oxford, 148 S.E. 2nd 624, 267 NC 552. Petitioner contends that in the McNeill case, the Supreme Court was dealing with taxation dispute, while the constitutional mandate requirement of the Fifth Amendment not been been enunciated and imposed. The Court language that addresses the statutory taking legally avoided the constitutional issue because of the presumption of constitutionality of existing law at N.C.G.S. 153-283 dealing with the standing of the taxpayer's suit. Petitioner

protests stare decision can not apply in denying his case because standing is not the issue to reach the Court of Appeals. Petitioner contends that, and records bear out, this contention at the January 30, 1995 Honorable Superior Court maintained petitioner actions in standing rejected defendants counter claim. Summary judgment that was allowed was on the basis of governmental immunity on the appeal issue. Court of Appeals Can Not Making A Finding To Replace The Trial Court. This same contention is also true at the May 25, 1995, Superior Court Order, in rejecting Motion for Dismissal. The petitioner contends that basis of his action is maintained at this issue: Inverse Condemnation Without Due Process Of Law And Just Compensation in response to a building inspector's order and actions. Petitioner

further contends that when his case reached the Superior Court, due process requirement is already imposed in N.C.G.S. 160A-428, 160A-429, 160A-430, and enunciated from U.S. Supreme Court in Lucas v. South Carolina Coastal Council, 505 U.S. 120 L.E.D. 2nd (1991) and James Daniel Good el-Property, 126 L.E.D. 2nd 490-491 (1993). The enunciatio of law imposed absolute authority requiring due process protection of Fifth Amendment of United States Constitution in an action against real property. Petitioner contends that in his case standing will sustain the assurance of a discretionary review.

ISSUE TO BE BRIEFED

In the event this Honorable Supreme Court of North Carolina allows this petition for discretionary review, Petitioner intends to present the following issues and his brief for

review:

1. Were the petitioner's constitutional rights violated when his use of property was denied when his water connection was cut off by City of Goldsboro Floyd M. McKeel, agent, and Charles R. Southerland, agent, without affording petitioner a hearing prior to such actions been taken?

2. Did the Curt err in granting the defendants' motion for summary judgment?

CONCLUSION

The Plaintiff respectfully asks the Court to consider hearing this case.

Respectfully submitted this 4th day of January, 1996.

"s/Robert E. Fuller, Jr."

Robert E. Fuller, Jr.

Attorney for the Plaintiff

State Bar No. 6158

P.O. Box 1121

Goldsboro, NC 27533-1121

(919) 735-7496

CERTIFICATE OF SERVICE

I, Robert E. Fuller, Jr., Attorney at Law, certify:

That I am and at all times hereinafter mentioned was more than eighteen (18) years of age; That on the 4th day of January, 1996, I served a copy of the foregoing Petition For Discretionary Review addressed to the following by hand delivering or mailing a copy of the same in the United States Mail, First Class, Postage prepaid addressed to:

W. Harrell Everett, Jr.
Attorney for Defendants
P.O. Drawer 10809
Goldsboro, NC 27532-0809

Stacey L. Fuller
Attorney for Defendants
P.O. Drawer 10809
Goldsboro, NC 27532-0809

I certify under penalty of perjury that the foregoing is true and correct.

This the 4th day of January, 1996.

"s/Robert E. Fuller, Jr."

Robert E. Fuller, Jr.
Attorney for the Plaintiff
State Bar No.: 6158
P.O. Box 1121
Goldsboro, NC 27533-1121
(919) 735-7496

Office of the Clerk
North Carolina Court of Appeals
John H. Connell, Clerk
P.O. Box 2779
Raleigh, North Carolina 27602
Telephone (919) 733-3561

23 January 1996

Honorable David B. Brantley
Clerk Superior Court
Wayne County
Goldsboro, NC Box 01-12-10

Re: Tseng Fu Lin v Goldsboro, et al
COA95-657
94CVS860

Dear Mr. Brantley:

Please be advised that we have prepared a certified copy of the record in the above referenced case and delivered same to the Clerk of the Supreme Court of North Carolina.

Sincerely yours,

"s/Kathy Taylor"

Deputy Clerk

Court of Appeals

CSC Orig

cc: Mr. Robert E. Fuller

FILED: February 22, 1996, 4:39 p.m., In the Office of Clerk Court Of Appeals Of North Carolina

No: COA95-657

EIGHT-B DISTRICT

NORTH CAROLINA COURT OF APPEALS

TSEUNG FU LIN d/b/a ORIENTAL JADE RESTAURANT	)	From Wayne
	)	94CVS860
V	)	
CITY OF GOLDSBORO, FLOYD McKEEL, Agent, and CHARLES R. SOUTHERLAND, Defendants	)	

ORDER

Petition for Discretionary Review to review the decision of the North Carolina Court of Appeals filed on the 19th day of

December 1995 was denied by order of the North Carolina Supreme Court of Appeals;

IT IS THEREFORE CERTIFIED to the Clerk of Superior Court Wayne County North Carolina that the North Carolina Supreme Court has denied the Petition for Discretionary Review filed by the Plaintiff in this cause.

WITNESS my hand and official seal this the 22nd day of February 1996.

"s/John H. Connell"

John H. Connell

Clerk, North Carolina Court of Appeals

"s/Kathy Taylor"

Deputy Clerk, North Carolina Court of Appeals

Orig. to CSC

Copy to:

Mr. Robert E. Fuller, Jr., Attorney at Law,

For Tseng Fu Lin

Mr. W, Harrell Everett, Jr., Attorney at Law,

For Goldsboro, et al

Ms. Stacey L. Fuller

No. 5P96

EIGHT-B DISTRICT

SUPREME COURT OF NORTH CAROLINA

TSENG FU LIN d/b/a ORIENTAL JADE RESTAURANT)
From NC Court of Appeals)
)
v)
(From Wayne COA 95-657))
)
CITY OF GOLDSBORO, FLOYD M. McKEEL, AGENT,)
(94CVS860)
and CHARLES R. SOUTHERLAND, AGENT)

ORDER

Upon consideration of the petition filed by Plaintiff in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of

Appeals:

"Denied by order of the Court in conference, this the 8th day of February 1996.

s/Orr, J.

For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 14th day of February 1996.

Christie Speir Cameron

Clerk, Supreme Court of North Carolina

"s/Marvea J. Francis"

Marvea J. Francis"

Assistant Clerk

Copy to:

North Carolina Court of Appeals

Mr. Robert E. Fuller, Jr., Attorney at Law, For Fu Lin

Mr. W. Harrell Everett, Jr., Attorney at Law,

For City of Goldsboro et al

Mr. Stacey L. Fuller, Attorney at Law, For City of Goldsboro

Mr. Ralph A. White, Appellate Court Reporter

West Publishing Company

Mead Data Corporation

Shepherd's McGraw-Hill

FILED: December 19, 1995, 8:07 a.m., Clerk of Court of Appeals, North Carolina

COA95-657

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 1995

TSENG FU LIN d/b/a
ORIENTAL JADE RESTAURANT,
Plaintiff

v. Wayne County

No. 94 CVS 860

CITY OF GOLDSBORO, FLOYD M. McKEEL, AGENT, and

CHARLES R. SOUTHERLAND, AGENT,

Defendants

Appeal by Plaintiff from summary judgment order entered 30 January 1995 by Judge Russell Lanier, Jr., in Wayne County Superior Court. Heard in the Court of Appeals 18 December 1995.

Robert E. Fuller, Jr., for plaintiff-appellant.

Everett, Womble, Finan & Riddle, by W. Harrell Everett, Jr., and Stacey L. Fuller, for defendant/appellees.

WYNN, Judge.

The following evidence was presented pursuant to a hearing held on defendants' motion for summary judgment and for sanctions: On 20 September 1991 and again on 24 March 1993, defendant City of Goldsboro (hereinafter "City") dispatched work crews to clean out a

section of sanitary sewer pipe in the vicinity of a restaurant owned by plaintiff. The crews on both occasions discovered the sewer main was clogged with large amounts of grease which had contaminated the plumbing of users farther down the line. John Hales, the City Inspector for the sewer system, determined that the source of the grease causing the blockage was plaintiff's restaurant. By letter dated 31 March 1993, Mr. Hales informed plaintiff that he was required to install a grease interceptor to protect the sewer main.

Sometime after 31 March 1993, a fire at plaintiff's restaurant required its closing for repairs. During the period of repair, plaintiff obtained a temporary water permit; however, City inspectors verbally advised him on several occasions that the grease interceptor needed to be installed before

permanent water service would be permitted.

By certified letter dated 3 December 1993, Chief City Inspector Floyd McKeel again notified plaintiff that he could not qualify for permanent water service until the grease interceptor was installed. Plaintiff failed to comply with the notifications for a period of nine months; consequently, on 15 December 1993, he was notified by certified letter that his permit to connect with the City water lines was revoked effective 16 December 1993. Plaintiff subsequently installed the grease interceptor and was reconnected to the water line.

Plaintiff instituted the underlying action for damages incurred when he was forced to close his restaurant due to being denied access to the City water lines. He contended that he was not provided with either notice or

an opportunity to be heard, and asked for actual and punitive damages. Defendants answered maintaining that the City and its agents acted in compliance with City Ordinances, and that adequate notice to plaintiff had been provided. Defendants further raised the affirmative defenses of governmental immunity and qualified immunity. On 29 November 1994, defendants moved for summary judgment and sanctions. By order dated 30 January 1995, defendants' motion for summary judgment was allowed. Plaintiff appealed.

We note at the outset that plaintiff has failed to follow each question presented with a reference to the assignments of error pertinent to the question as required by N.C.R. App. P. 28(b) (5). Arguments so

presented are deemed abandoned. Nevertheless, pursuant to the authority granted us by N.C.R. App. P. 2, we will address the issue raised by plaintiff on appeal.

Plaintiff contends that the trial court erred in granting summary judgment in favor of defendants because the City Ordinances under which he was denied water are unconstitutional. He maintains that the ordinances do not provide for an opportunity to be heard when a citizen is excluded from City services; therefore, his due process rights have been violated. We disagree.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled

to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). The movant can meet this burden in one of two ways: (1) by showing that an essential element of the opposing party's claim is nonexistent; or (2) demonstrating that the opposing party cannot produce evidence sufficient to support an essential element of the claim or overcome an affirmative defense which would work to bar his claim. Roumillat v. Simplistic Enterprises, Inc., 331 N.C. 57, 63, 414 S.E. 2d 339, 342 (1992).

In the instant case, defendants offered evidence that an essential element of the claim was nonexistent, as well as demonstrating the existence of an insurmountable affirmative defense. The record indicates that the trial court granted summary judgment on the basis of governmental

immunity. "Absent a statute imposing liability, cities 'acting in the exercise of police power, or judicial, discretionary, or legislative authority, conferred by their charters or by statute, and when discharging a duty imposed solely for the public benefit . . . are not liable for the tortious acts of their officers or agents.'" Lonon v. Talbert, 103 N.C. App. 686, 691, 407 S.E. 2d 276, 280 (1991) (quoting Hamiliton v. Hamlet, 238 N.C. 741, 742, 78 S.E. 2d 770, 771 (1953)).

Goldsboro City Ordinance § 25-37 provides that "all water and sewer service lines shall be as specified in North Carolina Plumbing Code, Volume 2, and as approved by the Plumbing Inspector." The North Carolina Plumbing Code, Volume 2, Ch. 8, § 801.4 provides in pertinent part:

> A grease interceptor shall be installed at the waste line leading from sinks, drains or other fixtures in the

following establishments when, in the opinion of the Plumbing Official, a hazard exists: restaurants, hotel kitchens or bars . . . or other uses where grease can be introduced into the drainage systems in quantities that can affect line stoppage or hinder sewage disposal.

The above language clearly supplies the legislative authority necessary to support the actions of defendants' agents, and to permit the application of the affirmative defense of governmental immunity in this case. For this reason, we can find no error by the trial court in awarding summary judgment on this ground.

We next address plaintiff's contention that the ordinance permitting the action taken by defendants' agents violated his constitutional rights to due process. We find out Supreme Court's decision in McNeill v. Harnett County, 327 N.C. 552, 398 S.E. 2d 475 (1990) controlling on this issue. In McNeill,

the appellants contended that the termination of water services without notice or opportunity for a hearing violated their right to due process. The Court held as follows:

> For the [appellants] to prevail on the basis of lack of notice and an opportunity to be heard, they must establish a property interest or entitlement to the water services. North Carolina law controls the existence or nonexistence of an entitlement. We hold that the water service furnished by the County here does not rise to the level of "property" protected by due process requirements. While other statutes specifically authorize disconnections in certain situations, N.C.G.S. § 153A-283 states specifically that '[i]n no case may a county be held liable for damages for failure to furnish water or sewer services.' In light of this statutory provision, a citizen of a county in North Carolina may not assert a claim of entitlement to water services.

McNeill, 327 N.C. at 571, 398 S.E. 2d at 485-86 (citations omitted).

Accordingly, plaintiff in this case had no property interest in the water service supplied by defendants, therefore he may not claim a violation of due process rights.

The McNeill Court went on to discuss the fact that even if a property interest did exist, sufficient notice was given in that case to protect the appellants from "erroneous or arbitrary withholding of essential services." Id. at 571-72, 398 S.E. 2d at 486, (quoting Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 18, 56 L. Ed. 2d 30, 44 (1978(, citing Mathews v. Eldridge, 424 U.S. 319, 47 L. Ed. 2d 18 (1976)). In the instant case, plaintiff was given numerous written and verbal notifications of the required grease interceptor over a period of nine months prior to the discontinuation of services. As such, plaintiff received sufficient notice to afford adequate protection from the arbitrary withholding of water services from his restaurant. Therefore, assuming arguendo that plaintiff had a property interest in the water

services, we can discern no infringement on his right to due process.

For these reasons, we find no error by the trial court and we affirm the order granting summary judgment in favor of defendants.

Affirmed.

Judges EAGLES and SMITH concur.

Report per Rule 30(e).

A True Copy
Clerk of the Court of Appeals of North Carolina
BY "s/Scoggins"
Deputy Clerk
December 19, 1995

NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
WAYNE COUNTY 94 CVS
TSENG FU LIN d/b/a ORIENTAL
JADE RESTAURANT,
Plaintiff

vs.

MOTION FOR
PRELIMINARY
INJUNCTION

CITY OF GOLDSBORO, FLOYD M. McKEEL, agent,
and CHARLES R. SOUTHERLAND, agent,
Defendant(s)

Plaintiff, pursuant to N.C.G.S. § 1-485, moves the Court to issue a preliminary injunction enjoining Defendant from cutting off the water and lights from the Plaintiff's business establishment. In support of this motion, Plaintiff submits the affidavit of TSENG FU LIN, which is attached as exhibit "A", stating that Defendant has taken the following actions in violation of Plaintiff's rights:

1. Turning off the Plaintiff's utilities

without affording Plaintiff a hearing prior to such action.

2. Causing the Plaintiff to shut down his business and to incur economic loss due to his inability to operate a restaurant without lights and water.

WHEREFORE, Plaintiff prays the Court that Defendant be preliminarily enjoined from cutting off the Plaintiff's utilities and that Defendant be ordered to turn Plaintiff's utilities on.

This the 18th day of April, 1994.

"s/Robert E. Fuller, Jr."

Robert E. Fuller, Jr.
Attorney for Plaintiff
NC Bar No. 6158
P.O. Box 1121
Goldsboro, NC 27533-1121
(919) 735-7496

CIVIL SUMMONS

STATE OF NORTH CAROLINA

WAYNE COUNTY

FILE NO. 94 CVS 860

SUPERIOR COURT DIVISION

PLAINTIFF: TSENG FU LIN d/b/a ORIENTAL JADE RESTAURANT

2102 N. 117 BYPASS

GOLDSBORO, NC 27530

VS.

DEFENDANT: CITY OF GOLDSBORO, FLOYD M. McKEEL, agent and CHARLES R. SOUTHERLAND, agent

CITY HALL

CENTER STREET

GOLDSBORO, NC 27530

PLAINTIFF'S ATTORNEY: ROBERT E. FULLER, JR.

P.O. BOX 1121

GOLDSBORO, NC 27533-1121

(919) 735-7496

DATE ISSUED: APRIL 20, 1994

TIME ISSUED: 9:42 a.m.

"s/Nora Aycock"

Deputy CSC

FILED: April 20, 1994, 9:42 a.m., Wayne County Clerk of Superior Court, Goldsboro, North Carolina

NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

WAYNE COUNTY FILE NO.: CVS 860

TSENG FU LIN d/b/a ORIENTAL JADE RESTAURANT,

Plaintiff,

vs. COMPLAINT

CITY OF GOLDSBORO, FLOYD M. McKEEL, agent, and CHARLES R. SOUTHERLAND, agent,

Defendant(s)

The Plaintiff, Tseng Fu Lin, complaining of the Defendant, alleges and says:

1. That the Plaintiff is a citizen and resident of Wayne County, North Carolina.

2. That the Plaintiff is the licensed owner and manager of the Oriental Gourmet,

Inc. and the Oriental Jade Restaurant located in Goldsboro, Wayne County. North Carolina.

3. That the said business was incorporated in the State of North Carolina on February 1, 1976.

4. That the Defendant, based upon information and belief, is a municipal corporation existing under the laws of the State of North Carolina and possessing the power, duties and authority vested in it by the General Assembly of North Carolina, including the power of building inspection.

5. That based upon information and belief, the Building Inspection Departments of the City of Goldsboro is under the supervision of the North Carolina Department of Insurance.

6. That based upon information and belief, Floyd McKeel is an agent of the Defendant in that he is the Chief Building

Inspector.

7. That based upon information and belief, Charles R. Southerland is an agent of the Defendant in that he is the Utilities Director.

8. That the Defendant, Floyd McKeel, ordered the closing of the Plaintiff's business for building code violations on December 15, 1993 without providing the Plaintiff with notice or an opportunity to be heard.

9. That the Defendant, Charles R. Southerland, shut off the utilities at the Plaintiff's business without providing the Plaintiff with notice or an opportunity to be heard.

10. that the Plaintiff has suffered substantial economic loss as a result of the actions of the Defendant.

WHEREFORE, the Plaintiff prays the Court that:

1. He have and recover the sum of $100,870.30 for his economic losses dating back to December 15, 1993.

2. He have and recover punitive damages from the Defendant.

2. The Defendant be ordered to turn on the utilities at the Plaintiff's business.

3. He have and recover the costs of this action including reasonable attorney's fees in the bringing of this action.

4. For such other and further relief as to the Court may seem just and proper.

This 18th day of April, 1994.

"s/Robert E. Fuller, Jr."

Robert E. Fuller, Jr.

Attorney for the Plaintiff

State Bar # 6158

P.O. Box 1121

Goldsboro, N.C. 27533-1121

(919) 735-7496

NORTH CAROLINA COURT OF APPEALS

TSENG FU LIN d/b/a ORIENTAL JADE RESTAURANT, Plaintiff	)
	) From Wayne County
v.	) No. 94 CVS 860
CITY OF GOLDSBORO, FLOYD M. McKEEL, AGENT, and CHARLES R. SOUTHERLAND, AGENT, Defendants	)

ORGANIZATION OF TRIAL TRIBUNAL

Plaintiff appeals from the Order entered by the Honorable Russell J. Lanier, Jr., at the January 30, 1995 term of Civil Superior Court, Wayne County, North Carolina. (Record filed C.A. June 19, 1995, and docketed C.A. July 13, 1995).

City of Goldsboro

P.O. Drawer A

North Carolina

27533-9701

(919) 735-6121

Certification No. P364 761820

March 31, 1993

Oriental Jade Restaurant

2102 N. Highway 117 Bypass

Goldsboro, NC 27530

Dear Sir(s);

Thank you for the time you took to discuss the grease problem at your restaurant. AS I told you at the time of our discussion, this is the second time in two years that our sanitation department has had to clean out a large section of sewer pipe where your building connects to our sewer main.

I do not know how the grease is getting

through, but the fact is that it is getting through. Therefore, I must insist that you obtain a licensed plumber to install a grease trap that will be of sufficient size and gallon per minute to protect our sewer. The fixtures that will need to be put on the grease trap must include: the dishwasher, the pots and pan sink, and floor drains that might receive wash down from the cooking area and the can wash.

As is customary, we will allow you thirty (30) days from the date of receipt of this letter to get the equipment installed. It is hoped that you will comply with this letter and further action can be avoided.

If I can be of further assistance, please do not hesitate to contact me by calling 580--389. My office hours are from 8:00 a.m. - 9:30 a.m. and from 4:00 p.m. - 5:00 p.m.

Monday through Friday.

Yours truly,

"s/John N. Hales"

John N. Hales

Plumbing/Mechanical Inspector

JNH:gf

cc: Floyd McKeel, Chief Inspector

City of Goldsboro
P.O. Drawer A
North Carolina
27533-9701
(919) 735-6121

December 3, 1993

Certification No. P375 015124

Mr. Tseng Fu Lin
Oriental Jade Restaurant
2102 N. Highway 117 Bypass
Goldsboro, NC 27530

Dear Mr. Lin:

The City Manager has asked that I write you concerning the reasons the Inspections Division of the City of Goldsboro has required that a grease interceptor be installed at your restaurant located at 2102 North Highway 117 Bypass.

I refer you to a certified letter dated

March 31, 1993 from John Hales, Plumbing/Mechanical Inspector for the City of Goldsboro, a copy of which is attached hereto. I believe this letter fully explains the Inspections Division's position concerning installation of a grease interceptor.

If I may summarize, the City's Maintenance Division has been called to your restaurant on two occasions in order to clean out a section of sanitary sewer pipe which was clogged with grease.

Since your restaurant is the first customer connected to the sanitary sewer main, the origin of the grease can only be attributed to your facility. In March, 1993, the Inspections Division requested that a licensed plumber install a grease interceptor of sufficient size and gallons per minute in order to protect the City of Goldsboro's

sanitary sewer system. You were subsequently granted 30 days from the date of receipt of the March 31, 1993 letter in order to comply with this directive.

As of this date, a grease interceptor has not been installed at the Oriental Jade Restaurant. The City of Goldsboro has the authority under the North Carolina State Plumbing Code to mandate this requirement. I refer to Chapter 8, Section 801-4 entitled "Grease Interceptors" of the State Plumbing Code which states, in part, that:

"A grease interceptor shall be installed in the waste line leading from sinks, drains or other fixtures in the following establishments when, in the opinion of the Plumbing Official, a hazard exists: restaurants, hotel kitchens or bars, factory cafeterias or restaurants, clubs, or other

uses where grease can be introduced into the drainage system in quantities that can affect line stoppage or hinder sewage disposal."

The City of Goldsboro has performed a considerable amount of maintenance on the sanitary sewer line coming into your establishment. I must advise you that, until such time a grease interceptor is installed at this location in compliance with the State Plumbing Code, authorization will not be forthcoming for permission to connect to water, sanitary sewer or electrical service. The system that currently exists at this restaurant is not achieving its intended purpose. A grease interceptor must be installed in order to meet City sanitary sewer standards.

I am asking for your cooperation in this matter. If you have any questions or if I can

be of assistance, you may contact me at 580-4346.

Your truly,

"s/Floyd McKeel"

Floyd McKeel

Chief Inspector

FM/RMS/ssj

Attachment

City of Goldsboro
P.O. Drawer A
North Carolina
27533-9701
(919) 735-6121

December 15, 1993

Tseng Fu Lin
2102 N. US Highway 117 Bypass
Goldsboro, NC 27530

Dear Mr. Lin:

This letter is to advise you that failure on your part to install a grease trap at your restaurant, known as Oriental Jade, located at the above mentioned address, by 12:00 p.m. Thursday, December 16, 1993, this office will have no alternative but to have your water service disconnected.

You have been given ample opportunity to meet the requirements of the State Building

Code and the City Ordinance requiring you to have a grease trap installed. The first notice was mailed to you in March 31, 1993. You have not, as of this date, complied with our request. Therefore, failure on your part to comply with this notice will result in the water service being terminated.

Asking for your cooperation in this matter. If you have any questions, please contact me by calling 580-4346.

Sincerely,

"s/Floyd McKeel"

Floyd McKeel

Chief Inspector

FM: (no signature)

Aknowledgment of Receival

Mr. Tseng Lin or Authorized Representative

"s/R.D. Roscoe"

Officer, Goldsboro Police Dept.

12/15/93 11:12 a.m.

Date and Time of Delivery

FILED: February 6, 1995, 12:38 p.m., Wayne County Clerk of Superior Court, Goldsboro, North Carolina

NORTH CAROLINA COURT OF APPEALS

TSENG FU LIN	)	
ORIENTAL JADE RESTAURANT	)	
	)	
v.	)	From
	)	Wayne County
	)	No.94 CVD 860
CITY OF GOLDSBORO, FLOYD M.	)	
McKEEL, Agent, and CHARLES	)	
R. SOUTHERLAND, Agent	)	

NOTICE OF APPEAL

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Plaintiff, Tseng Fu Lin d/b/a Oriental Jade Restaurant, hereby gives Notice of Appeal to the Court of Appeals of North Carolina from the order entered on January 30, 1995, in the Superior Court of Wayne County, which granted the Defendants' Motion for Summary

Judgment.

Respectfully submitted this the 6th day of February, 1995.

ROBERT E. FULLER, JR.

BY "s/Robert E. Fuller, JR."

Robert E. Fuller, Jr.

Attorney for Defendant/Appellant

N.C. State Bar # 6158

P.O. Box 1121

Goldsboro, NC 27533-1121

(919) 735-7496

FILED: June 7, 1995, 2:46 p.m., Wayne County Clerk of Superior Court, Goldsboro, North Carolina

NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

WAYNE COUNTY FILE NO.: 94 CVS 860

TSENG FU LIN, d/b/a
ORIENTAL JADE RESTAURANT,

Plaintiff

vs. ORDER

CITY OF GOLDSBORO, FLOYD M.McKEEL, Agent, and CHARLES R. SOUTHERLAND,

Defendants

THIS MATTER, coming on to be heard and being heard before the undersigned Superior Court Judge, sitting at the May 22, 1995, Term of Wayne County Superior Court, the same being a mixed session, upon the motion of the

Defendant for Dismiss Appeal and for Sanctions; and the Court, after hearing the arguments of counsel and the pleadings, allows the Plaintiff until May 26, 1995, at 5:00 p.m. to serve on the Defendant's attorney the Record on Appeal at which time the Defendant's attorney will withdraw their motion.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff's attorney shall have until May 26, 1995, at 5:00 p.m. to serve on the Defendant's attorney the Record on Appeal at which time the Defendant's attorney will withdraw their motion.

Entered this 22nd day of May, 1995

Signed this 2nd day of June, 1995.

"s/W. Osmond Smith"

OSMOND SMITH

Judge Presiding

ASSIGNMENT OF ERROR

Defendant assigns as error:

The Court's granting the Defendant's Motion for Summary Judgment as there were genuine issues of fact to be decided in this case.

Exception # 1, Transcript page 12.

CERTIFICATE OF SERVICE OF PROPOSED RECORD ON APPEAL

This is to certify that the undersigned has this date served W. Harrell Everett, Jr. Attorney for Defendant/Appellant, with a copy of the foregoing Proposed Record on Appeal by hand delivering the same to his office, in the manner prescribed by Rule 5 of the Rules of Civil Procedure, as follows:

W. Harrell Everett, Jr.
Everett, Womble, Finan and Riddle
507-B N. Spence Avenue
Goldsboro, NC 27532

This the 25th day of May, 1995.

"s/Robert E. Fuller, Jr."
Robert E. Fuller, Jr.
Attorney for Plaintiff/Appellee
P.O. Box 1121

Goldsboro, NC 27530

(919) 735-7496

SETTLEMENT OF RECORD ON APPEAL

This is to certify that the Proposed Record on Appeal served on W. Harrell Everett, Jr. the 25th day of May, 1995, shall constitute the Record on Appeal in this matter, by stipulation of counsel.

This the 25th day of May, 1995.

"s/Robert E. Fuller, Jr."

"s/W. Harrell Everett, Jr."

Robert E. Fuller, Jr.

W. Harrell Everett, Jr.

Attorney for Plaintiff/Appelle

Attorney for Defendant/Appellant

NAMES AND ADDRESSES OF COUNSEL

W. Harrell Everett, Jr.
Everett, Womble, Finan and Riddle
Attorney for Defendant/Appellant
P.O. Box 10809
507-B N. Spence Avenue
Goldsboro, NC 27532-0809
(919) 778-6707

Robert E. Fuller, Jr.
Law Office of Robert E. Fuller, Jr.
Attorneys for Plaintiff/Appellee
P.O. Box 1121
109 N. William Street
Goldsboro, NC 27533-1121
(919) 735-7496

CERTIFICATE OF SERVICE OF RECORD ON APPEAL

This is to certify that the undersigned has this date served W. Harrell Everett, Jr., Attorney for Defendant/Appellee, with a copy of the foregoing Record on Appeal by hand delivering the same to his office, in the manner proscribed by Rule 5 of the Rules of Cilvil Procedure, as follows:

W. Harrell Everett, Jr.
Everett, Womble, Finan and Riddle
Attorney for Defendant/Appellee
P.O. Drawer 10809
507-B N. Spence Avenue
Goldsboro, NC 27532-0809
(919) 778-6707

Counsel for both parties further stipulate to the inclusion of copies of the Motion to Dismiss Appeal dated March 7, 1995, and the Response to said Motion filed March

30, 1995, may be used on this Record on Appeal, and further stipulate that the unsigned copy of the Order of May 22, 1995, accurately reflects the Order entered by the Honorable Jack Thompson in open Court on May 22, 1995.

This the 31st day of May, 1995.

"s/Robert E. Fuller, Jr."

Robert E Fuller, Jr.

Attorney for Plaintiff/Appellant

P.O. Box 1121

Goldsboro, NC 27533-1121

(919)735-7496

"s/W. Harrell Everett, Jr."

W. Harrell Everett, Jr.

Attorney for Defendant/Appellee

P.O. Drawer 10809

Goldsboro, NC 27532-0809

(919) 778-6707

Supreme Court, U.S.
FILED
AUG 19 1996
CLERK

No. 95-2040

In The

Supreme Court of the United States

October Term, 1995

TSENG FU LIN, d/b/a ORIENTAL JADE RESTAURANT,

Petitioner,

v.

CITY OF GOLDSBORO, FLOYD McKEEL, and CHARLES R. SOUTHERLAND,

Respondents.

On Petition For A Writ Of Certiorari To The North Carolina Court Of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

W. HARRELL EVERETT, JR., Esquire
Counsel of Record
EVERETT, WOMBLE & FINAN, L.L.P.
507 B Spence Avenue
P.O. Drawer 10809
Goldsboro, NC 27532-0809
(919) 778-6707

Attorney for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

51pp

QUESTION PRESENTED FOR REVIEW

Whether the North Carolina Court of Appeals erred in affirming the North Carolina Superior Court's grant of summary judgment for Respondents?

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Contents..... ii

Table of Authorities iii

Statement of the Case 1

Argument 4

Conclusion 11

Appendix

North Carolina Superior Court Order of February 1, 1995 Granting Summary Judgment .....App. 1

Answer and Counterclaim .....App. 2

Affidavit of John N. Hales.....App. 16

Response to Petition for Discretionary Review by North Carolina Supreme Court .....App. 19

Goldsboro City Ordinance §25-35 .....App. 22

Goldsboro City Ordinance §25-37 .....App. 23

N.C.G.S. §143-139.....App. 25

N.C.G.S. §160A-174 .....App. 28

N.C.G.S. §160A-311 .....App. 30

N.C.G.S. §160A-312 .....App. 31

N.C.G.S. §160A-411 .....App. 32

North Carolina Plumbing Code, Volume 2, Chapter 8, §§ 801.1, 801.4.....App. 34

TABLE OF AUTHORITIES

Page

CASES:

Birnbaum v. Trussell, 347 F.2d 86 (2nd Cir. 1965) 5, 7

Board of Regents v. Roth, 565 U.S. 564 (1972)..... 7

City of Ladue, et al. v. Gilleo, 512 U.S. 129 (1994)..... 7

Dohany v. Rogers, 281 U.S. 362 (1930)..... 10

Dolan v. City of Tigard, 114 S.Ct. 2309 (1994) 10

Gaffney v. Silk, 488 F.2d 1248 (1st Cir. 1973) 5, 7

Harlowe v. Fitzgerald, 457 U.S. 800 (1982) 5, 7

Mathews v. Eldridge, 424 U.S. 319 (1976) 9

McNeill v. Harnett County, 327 N.C. 552, 398 S.E.2d 475 (1990) 8, 9

Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1 (1978) 7, 9

Nelson v. Knox, 256 F.2d 312 (6th Cir. 1958) 5, 7

Oyama v. California, 332 U.S. 633 (1948) 10

Turpin v. Lemon, 187 U.S. 51 (1902)..... 10

Youngstown Sheetmetal & Tubing v. Sawyer, 343 U.S. 579 (1952) 7

STATUTES:

Goldsboro City Ordinance §25-35 ..... 1, 2, 8

Goldsboro City Ordinance §25-37 5

North Carolina General Statutes §143-139 6

North Carolina General Statutes §153A-283..... 8

TABLE OF AUTHORITIES – Continued

Page

North Carolina General Statutes §160A-174..... 6

North Carolina General Statutes §160A-312..... 8

North Carolina State Plumbing Code, Volume 2, Chapter 8, §801.4..... 5

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the petition for a writ of certiorari seeking review of the decision of the North Carolina Court of Appeals in this case. (Discretionary review denied by the North Carolina Supreme Court.)

STATEMENT OF THE CASE[1]

The Petitioner is the owner of a restaurant at 2102 North 117 Bypass, Goldsboro, North Carolina, entitled the Oriental Jade Restaurant. On September 20, 1991 and March 24, 1993, the City maintenance crews cleaned out a large section of sanitary sewer pipe where Petitioner's building connected to the City's sanitary sewer main. Said sanitary sewer main was clogged with grease and had contaminated the plumbing of citizens connected to the sewer further down-line. (Appendix p. 5). John Hales, Plumbing/Mechanical Inspector for the City of Goldsboro, determined that, because the Petitioner's restaurant was the first customer connected to the sanitary sewer main, the Petitioner's restaurant was the source of the grease blockage. (Appendix p. 5). By letter dated March 31, 1993, Mr. Hales notified the Petitioner that, because of the grease problem they had previously discussed, the Petitioner was required by Goldsboro City Ordinance §25-35 to install a grease trap of sufficient size and strength to protect the City's sanitary sewer main.

[1] Pursuant to Rule 24.2, Respondents tender this Statement of the Case to correct factual misstatements by Petitioner.

(Petitioner's Appendix p. 82). Mr. Hales verbally advised the Petitioner on numerous occasions between March 31, 1993, and December 15, 1993, that a grease interceptor, as required by the North Carolina State Plumbing Code, would have to be installed in the restaurant. (Appendix pp. 5-6).

Sometime after March 31, 1993, there was a fire at the Oriental Jade Restaurant. The restaurant closed for repairs to the building. Although the Petitioner was denied a water permit because he had failed to install the grease interceptor, he was granted a temporary water permit for the purpose of repairing the building. (Appendix p. 6).

By certified letter of December 3, 1993, Chief Building Inspector, Floyd McKeel, again notified the Petitioner that water service to the Petitioner's building would not be authorized on a permanent basis until such time as a grease interceptor was installed, pursuant to the North Carolina State Building Code and City Ordinance. (Petitioner's Appendix p. 85). Thereafter, Petitioner requested a variance from this requirement from the City of Goldsboro, which request was denied. (Petitioner's Appendix p. 18). The Petitioner failed to comply with the directives and notifications from the Respondents over an extended period of nine months and, as a result, the Petitioner was notified by certified letter dated December 15, 1993 that his permit to connect with City water was revoked effective December 16, 1993, pursuant to Goldsboro City Ordinance §25-35. (Petitioner's Appendix p. 90).

The Petitioner subsequently installed the grease interceptor, was granted a water permit, reopened his

business and was granted sewer service. (Appendix p. 16).

Petitioner filed a complaint on April 20, 1994 alleging that Respondents ordered the closing of Petitioner's business and shut off the utilities at his restaurant without providing Petitioner with notice or an opportunity to be heard. (Petitioner's Appendix p. 76). The Superior Court denied Petitioner's motion for a preliminary injunction directing the Respondents to provide utility service. (Petitioner's Appendix p. 34). After hearing the arguments of both parties, the North Carolina Superior Court, Honorable Russell Lanier presiding, granted Respondents' Motion for Summary Judgment on the ground that Respondents were protected from suit by governmental immunity. (Petitioner's Appendix p. 1, Respondents' Appendix p. 1).

On December 19, 1995, the North Carolina Court of Appeals affirmed the Superior Court's decision on the following grounds: 1) Respondents' actions were authorized by North Carolina statutory law, thereby permitting the application of governmental immunity by the Superior Court; 2) based on North Carolina case law, Petitioner had no property interest in the water service and, therefore, could not claim a violation of his due process rights; and 3) assuming arguendo that Petitioner did have a property interest in the water service, there was no infringement on his right to due process. (Petitioner's Appendix p. 61). The North Carolina Supreme Court denied Petitioner's request for discretionary review on February 8, 1996. (Petitioner's Appendix p. 59). Petitioner now asks this Court to review this decision.

In his Statement of Fact, Petitioner makes two allegations that have not been raised prior to this petition. Petitioner alleges that, after investigation, federal authorities declined to take any action against him because North Carolina authorities had already determined that Petitioner had "complied with the law by having a Grade A Report" (citing Petitioner's Appendix p. 15). Respondents have no knowledge of any investigation or allegations pursuant to the 'Clean Water Protection Law' and suggest that the report provided by Petitioner does not address compliance with the North Carolina Plumbing Code. Furthermore, contrary to Petitioner's statements, the letter of December 9, 1993 from North Carolina Governor James B. Hunt, Jr. (Petitioner's Appendix p. 16), does not indicate that the State decided not to prosecute Petitioner's violation of the North Carolina Plumbing Code. Rather, the letter requests further information from Petitioner in order that the Department of Insurance may render a decision. These allegations have not been previously addressed by the state courts nor has Petitioner introduced any evidence to support either allegation at neither the state trial court nor state appellate court.

ARGUMENT

THE NORTH CAROLINA COURT OF APPEALS HAS *NOT* DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH DECISIONS OF ANOTHER STATE COURT OF LAST RESORT OR THE UNITED STATES COURT OF APPEALS OR THE UNITED STATES SUPREME COURT

The Petitioner has failed to provide this Court with any decisions of another state court of last resort, the

United States Court of Appeals, or the United States Supreme Court which decide a federal question in a way contrary to the decision of the North Carolina Court of Appeals in this case.

Petitioner contends that the decision of the North Carolina Court of Appeals in this case is contrary to the decisions of the Courts of Appeal in *Nelson v. Knox*, 256 F.2d 312 (6th Cir., 1958); *Gaffney v. Silk*, 488 F.2d 1248 (1st Cir. 1973); and *Birnbaum v. Trussell*, 347 F.2d 86 (2nd Cir. 1965); as well as this Court's decision in *Harlowe v. Fitzgerald*, 457 U.S. 800 (1982). In fact, the decision of the North Carolina Court of Appeals is consistant with and in accordance with these decisions.

Nelson, Gaffney, Birnbaum, and *Harlowe* each stand for the proposition that municipal officers do not have complete immunity but, rather, have only a qualified privilege that acts as a defense against liability for harm caused by acts done by them in good faith in performance of their official duties as they understood it. Clearly, if a municipal officer violates a person's constitutional or federal rights, the doctrine of immunity is abrogated. *Birnbaum, supra.*

The North Carolina Court of Appeals, in affirming the Superior Court's decision, found that the acts of Respondents were legislatively authorized. (Petitioner's Appendix p. 68). Goldsboro City Ordinance §25-37 provides that "all water and sewer service lines shall be as specified in North Carolina Plumbing Code, Volume 2, and as approved by the Plumbing Inspector." The North Carolina State Plumbing Code, Volume 2, Chapter 8, §801.4 provides, in relevant part, that:

> A grease interceptor shall be installed at the waste line leading from sinks, drains or other fixtures in the following establishments when, in the opinion of the Plumbing Official, a hazard exists: restaurants, hotel, kitchens or bars . . . or other uses where grease can be introduced into the drainage systems in quantities that can affect line stoppage or hinder sewage disposal.

Furthermore, pursuant to North Carolina General Statutes §§160A-174 and 143-139, respectively, the City of Goldsboro has the right to prohibit or abate conditions detrimental to the health, safety or welfare of the City and to enforce the North Carolina Building Code.

The North Carolina Court of Appeals found that this legislation supported the actions of Respondents. It authorized Respondent's plumbing official to require the installation of a grease interceptor by Petitioner and, when necessary, abate the condition that was detrimental to the health and welfare of the citizens of Goldsboro. On March 31, 1993, after determining that Petitioner's restaurant was the source of the grease that had repeatedly clogged the City's sanitary sewer main, the Plumbing Inspector notified Petitioner and directed him to install the grease interceptor, as was required by the North Carolina Plumbing Code, *supra*. After repeated notifications over a period of nine months, and Petitioner's continuing refusal to install the grease interceptor, Respondents acted to protect the health and welfare of the citizens of Goldsboro and prohibit this detrimental situation by revoking Petitioner's temporary water permit. Shortly thereafter, Petitioner installed the grease interceptor and was granted a water permit, as provided by the relevant legislation.

Nelson, Gaffney, Birnbaum, and *Harlowe* each set forth the doctrine of qualified, good faith immunity. The North Carolina Court of Appeals found that Respondents' actions were not only in good faith but also legislatively authorized. Accordingly, the decision of the North Carolina Court of Appeals is not in contradiction with, but is, in fact, in accordance with the cases cited by Petitioner. Therefore, the Court should not grant certiorari on this basis.[2]

Petitioner also alleges that the North Carolina Court of Appeals erred in rejecting Petitioner's claim that Respondents' actions violated his constitutional right to due process. For Petitioner to prevail on the basis of lack of due process, Petitioner must first establish a property interest or an entitlement to the water services. Protected interests are normally not created by the Constitution; rather, they are created and defined by an independent source such as state statutes or rules entitling a citizen to certain benefits. *Board of Regents v. Roth,* 565 U.S. 564, 577 (1972); *Memphis Light, Gas and Water Div. v. Craft,* 436 U.S. 1 (1978). Under *Roth* and *Memphis Light,* the court will

---

[2] Petitioner also contends that the decision of the North Carolina Court of Appeals in this case is contrary to this Court's decisions in *City of Ladue, et al. v. Gilleo,* 512 U.S. 129 (1994) (holding that a city ordinance banning all residential signs, but those falling within limited exceptions, violated resident's free speech rights), and *Youngstown Sheetmetal & Tubing v. Sawyer,* 343 U.S. 579 (1952) (holding that the President was without the authority to order the seizure of the plants of steel companies involved in a labor dispute). However, Respondents are unable to ascertain how these cases are relevant, let alone contrary, to the case at hand. In fact, Petitioner fails to cite any rulings contrary to the decision of the North Carolina Court of Appeals.

look to North Carolina law to determine whether a citizen has a substantive interest in water services. In the instant case, the North Carolina Court of Appeals found that *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990), was controlling and necessitated the conclusion that Petitioner had no property interest in the water service provided by Respondents and, therefore, could not claim a violation of his due process rights.

In *McNeill*, the appellants contended that the termination of water services without notice or opportunity for a hearing violated their right to due process. The North Carolina Supreme Court held that the water service furnished by the County did not rise to the level of "property" protected by due process requirements. *Id.*, 327 N.C. at 571. The Honorable Justice Meyer found that, while other statutes specifically authorize disconnections in certain situations, the language of N.C.G.S. §153A-283 states specifically that "[i]n no case may a county be held liable for damages for failure to furnish water or sewer services."[3]

The Court concluded that, in light of this statutory language, "a citizen of a county in North Carolina may not assert a claim of entitlement to water services." *Id.* Based upon the *McNeill* decision, the North Carolina Court of Appeals concluded that Petitioner had no property interest in Respondents' water services.

---

[3] Similarly, Goldsboro City Ordinance §25-35, as authorized by N.C.G.S. §160A-312(b), provides, in pertinent part, "[n]o party interested shall have a claim for damage in consequence of [a permit to connect with the city water and sewer systems] being revoked or annulled."

The North Carolina Court of Appeals further stated that, even if Petitioner had a property interest in the water services, it could not discern any infringement on Petitioner's right to due process. The Court discussed the requirement set forth in *Memphis Light* that there be sufficient notice to afford reasonable assurance against "erroneous or arbitrary withholding of essential services." *Id.*, 436 U.S. at 18 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)). Citing *McNeill, supra,* the Court found that Petitioner was given numerous written and verbal notifications and directives of the required grease interceptor over a period of at least nine months prior to the termination of water services. Petitioner knew to whom, where, when and how he could discuss the Plumbing Code requirement of a grease interceptor and the potential for termination of the water services from the letters of March 31, 1993, December 3, 1993, and December 15, 1993 (Petitioner's Appendix pp. 82, 85, 90, respectively) as well as his many meetings in person with the inspectors.[4]

The Court held that this was "adequate protection from the arbitrary withholding of water services from his restaurant." Therefore, the Court held, assuming arguendo, that Petitioner had a property interest in the water services, Respondents did not violate his right to due process in light of the facts in the instant case.

---

[4] Although the North Carolina Court of Appeals did not note this, Petitioner states in his Statement of Fact that he even participated in the City's administrative procedure by filing for a variance in December 1993, which was denied by Respondents' inspector. (Petitioner's Appendix p. 18).

Petitioner contends that this ruling is in contradiction with this Court's decision in *Oyama v. California*, 332 U.S. 633 (1948). However, in *Oyama*, this Court held that the California Alien Land Law, as applied to a minor American citizen whose parents were ineligible for naturalization, discriminated on the basis of racial descent and deprived the minor of equal protection of the laws. The holding of the North Carolina Court of Appeals in this case is in no way contrary to this Court's decision in *Oyama*.[5]

Finally, Petitioner states that this Court has held that when "water is cut off and there is a refusal to turn it back on while the petitioner's license is still in force and no exigencies such as fire or shortage exist, but is used merely to abate an ordinance violation without the limits of constitutional guarantees" Article VI of the Constitution is violated. (Petition for Writ, pp. 18-19, citing *Dohany v. Rogers*, 281 U.S. 362 (1930); *Turpin v. Lemon*, 187 U.S. 51 (1902); and *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994)). However, this is not correct and is a clear misstatement of this Court's rulings in these cases. The cited cases resolve issues of eminent domain and are not contrary to the holding of the North Carolina Court of Appeals in the instant case.

---

[5] Petitioner also contends that the Court's ruling violated his "entitlement to an American Dream." (Petition for Writ, p. 23). Petitioner fails to cite any authority for this "entitlement" and Respondents have been unable to ascertain any state or federal statutory or case law to support this contention.

CONCLUSION

The decision of the North Carolina Court of Appeals does not constitute new law nor does it conflict with decisions of other state courts of last resort, the United States Courts of Appeal, or the United States Supreme Court. Accordingly, Respondents respectfully request that the Court deny the petition for a writ of certiorari.

This the 19th day of August, 1996.

Respectfully submitted,

W. HARRELL EVERETT, JR.
EVERETT, WOMBLE &
FINAN, L.L.P.
507 B Spence Avenue
P.O. Drawer 10809
Goldsboro, NC 27532-0809
(919) 778-6707

Attorney for Respondents

APPENDIX

FILED: February 1, 1995, 11:01 a.m., Wayne County Clerk of Superior Court

NORTH CAROLINA
WAYNE COUNTY

TSENG FU LIN d/b/a ORIENTAL JADE RESTAURANT,
Plaintiff,

vs.

CITY OF GOLDSBORO, FLOYD M. McKEEL, agent, and CHARLES R. SOUTHERLAND, agent,
Defendants.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 94 CVS 860

ORDER

This Order came on for hearing before the undersigned Judge upon Defendants' written Motion for Summary Judgment, and the Court having considered the pleadings before the Court and heard oral argument of the parties, it appears that there are no genuine issues of material fact and that the Defendants are entitled to Summary Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that Defendants' Motion for Summary Judgment by and is hereby GRANTED.

This the 30th day of January, 1995.

/s/ Honorable Russell J. Lanier
Judge Presiding

FILED: June 27, 1994, 2:39 p.m., Wayne County Clerk of Superior Court

NORTH CAROLINA WAYNE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NO.: 94 CVS 860
TSENG FU LIN d/b/a ORIENTAL JADE RESTAURANT, Plaintiff, vs. CITY OF GOLDSBORO, FLOYD M. McKEEL, agent, and CHARLES R. SOUTHERLAND, agent, Defendants.	**ANSWER AND COUNTERCLAIM**

MOTION TO DISMISS

Now come the Defendants, by and through their attorney, L. Ashley Smith, and move the Court pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure to dismiss the Complaint of the Plaintiff for failure to state a claim upon which relief can be granted.

FIRST DEFENSE

GOVERNMENTAL IMMUNITY

Defendant, City of Goldsboro, pleads the doctrine of governmental immunity in bar of Plaintiff's claims for damages.

SECOND DEFENSE
QUALIFIED IMMUNITY

Plaintiff has brought this action against Defendant Municipality alleging that the Defendant Municipality ordered the closing of Plaintiff's business without providing the Plaintiff with notice or opportunity to be heard. Plaintiff complains of actions taken by Defendants McKeel and Southerland while acting in their official capacity as employees of Defendant Municipality.

In carrying out the complained of actions, the Defendants McKeel and Southerland were acting in good faith and within the scope of their authority. In so acting, the Defendants McKeel and Southerland did not breach any duty to Plaintiff which was clearly established as a matter of law at the time of the complained of incident. Thus, Defendants are entitled to qualified, good faith immunity from this suit.

THIRD DEFENSE
RESPONDING TO SPECIFIC ALLEGATIONS OF THE COMPLAINT

The Defendants, answering the Complaint of the Plaintiff, allege and say as follows:

1. That the allegations contained in paragraphs 1, 4, and 7 of the Complaint are admitted.

2. That as to the allegations contained in paragraphs 2 and 3 of the Complaint, the Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations in said paragraphs, and the same are, therefore, denied.

3. That as to the allegations contained in paragraph 6 of the Complaint, it is admitted that the Defendant, Floyd M. McKeel was an agent of the Defendant, City of Goldsboro, at the time of the events allegedly giving rise to the Complaint. Except as expressly admitted herein, the remaining allegations in paragraph 6 of the Complaint are denied.

4. That as to the allegations contained in paragraph 8 of the Complaint, it is admitted that the Defendant, Floyd M. McKeel, authorized the termination of water service to 2102 North Highway 117 By-Pass, Goldsboro, North Carolina, on December 15, 1993. Except as expressly admitted herein, the remaining allegations in paragraph 8 of the Complaint are denied.

5. The allegations contained in paragraphs 5, 9 and 10 of the Complaint are denied.

FOURTH DEFENSE

By way of a further and affirmative defense, the Defendants allege and says as follows:

6. The right to prohibit or abate conditions detrimental to the health, safety or welfare of the Defendant City has been delegated to Defendant City by G.S. § 160A-174.

7. The right to enforce the North Carolina Building Code has been delegated to Defendant City by G.S. § 143-139.

8. Goldsboro City Ordinance § 25.37 provides that "all water and sewer service lines shall be as specified in

North Carolina Plumbing Code, Volume 2, and as approved by the Plumbing Inspector."

9. The North Carolina State Plumbing Code, Volume 2, Chapter 8, § 801-4 provides, in part, that:

> A grease interceptor shall be installed at the waste line leading from sinks, drains or other fixtures in the following establishments when, in the opinion of the Plumbing Official, a hazard exists: restaurants, hotel kitchens or bars, factory cafeterias or restaurants, clubs, or other uses where grease can be introduced into the drainage systems in quantities that can affect line stoppage or hinder sewage disposal.

10. On both September 20, 1991, and March 24, 1993, City maintenance crews cleaned out a large section of sanitary sewer pipe where Plaintiff's building connected to the sanitary sewer main. Said sanitary sewer main was clogged with grease and had contaminated the plumbing of citizens connected to the sewer further down-line. As Plaintiff's restaurant was the first customer connected to the sanitary sewer main, the origin of the grease can only be attributed to Plaintiff's facility.

11. By letter dated March 31, 1993, John N. Hales, Plumbing/Mechanical Inspector for the City of Goldsboro, notified Oriental Jade Restaurant that the City was requiring Plaintiff to install a grease trap of sufficient size and strength to protect the City's sanitary sewer main. A copy of said letter is attached as hereto Exhibit "A" and incorporated herein by reference.

12. That John N. Hales, Plumbing/Mechanical Inspector for the City of Goldsboro, verbally advised the Plaintiff, Tseng Fu Lin, on numerous occasions between

March 31, 1993, and December 15, 1993, that a grease interceptor would have to be installed in the restaurant as required by the North Carolina State Plumbing Code.

13. That despite receipt of Defendant's letter of March 31, 1993, and the numerous oral warnings, Plaintiff refused and still refuses to install a grease interceptor in the restaurant at 2102 North Highway 117 By-Pass, Goldsboro, North Carolina, in order to bring the building into compliance with City Ordinances and the North Carolina State Building Code.

14. That some time after March 31, 1993, Oriental Jade Restaurant closed in order to make repairs caused by fire. Temporary water service was authorized to the premises so that Plaintiff's contractor could perform the needed repairs.

15. By certified letter, return receipt requested, dated December 3, 1993, from Floyd M. McKeel, Chief Inspector of the City of Goldsboro, Plaintiff was notified that water service to 2102 North Highway 117 By-Pass, Goldsboro, North Carolina, would not be authorized on a permanent basis until such time as a grease intercepter [sic] was installed pursuant to the North Carolina State Building Code and City Ordinances. A copy of said letter and the return receipt signed by Plaintiff are attached hereto as Exhibit "B" and incorporated herein by reference.

16. Plaintiff having failed to comply with the reasonable requests and notifications from the Defendant City over a period of nine (9) months, Plaintiff's permit to connect with City water was revoked pursuant to Goldsboro City Ordinance § 25-35 on December 15, 1993. A

letter from Floyd M. McKeel, Chief Inspector, to the Plaintiff dated December 15, 1993, informing Plaintiff of this action, is attached hereto as Exhibit "C" and incorporated herein by reference.

17. That the Defendant City and its agents were at all times acting properly and within the scope of their authority as established by City Ordinance and State Statutes.

18. That notice sufficient to advise Plaintiff to bring his property into compliance with City Ordinances and the State Building Code was provided, and Plaintiff's right to due process has, in no way, been violated.

FOURTH DEFENSE

19. As a further defense, and complete or partial bar to any claim Plaintiff may have for damages, Defendant asserts § 25-35 of the Goldsboro City Ordinances which provides that "no party interested shall have a claim for damage in consequence of [its City Water] permit being revoked or annulled."

COUNTER CLAIM

MOTION FOR MANDATORY INJUNCTION AND ORDER OF ABATEMENT

20. Paragraphs 1 through 19 above are re-alleged and incorporated herein by reference as if fully set forth.

21. That Plaintiff is in willful violation of Goldsboro City Ordinance and the State Building Code in that he refused and still refuses to install a grease interceptor at

2102 North Highway 117 By-Pass, Goldsboro, North Carolina.

22. That the discharge of water by a restaurant business at 2102 North Highway 117 By-Pass, Goldsboro, North Carolina, into the City sewer system without the installation of a grease interceptor would be detrimental to the health, safety and welfare of the citizens of Defendant Municipality.

23. That, if the Plaintiff wishes to receive a business license and water permit to operate a restaurant business at the location in question, the City is in need of a mandatory injunction ordering Plaintiff to install a grease interceptor to bring the property into compliance with the North Carolina State Building Code and Goldsboro City Ordinances.

WHEREFORE, the Defendants pray the Court as follows:

1. For an Order dismissing this action as to Defendants McKeel and Southerland;

2. That the relief requested in Plaintiff's Complaint be denied, and that he have and recover nothing by way of damages, compensatory or punitive, from the Defendants;

3. That the Court enter an Order of abatement and mandatory injunction requiring Plaintiff to install a grease interceptor in compliance with Goldsboro City Ordinances and the North Carolina State Building Code in the restaurant facility at 2102 North Highway 117 By-Pass, Goldsboro, North Carolina, prior to the issuance of

any permit to connect with City Water or to operate a business at said location, all at his expense;

4. That Defendants have and recover the costs of this action, including reasonable attorney's fees, as may be allowed by law; and

5. For such other and further relief as to the Court seems just and proper.

This the 27th day of June, 1994.

EVERETT, WOMBLE, FINAN
& RIDDLE

/s/ L. Ashley Smith
State Bar No. 19273
Attorney for Defendants
P.O. Drawer 10809
Goldsboro, NC 27532-0809
(919) 778-6707

Exhibit "A"

City of Goldsboro

P. O. Drawer A
North Carolina
27533-9701

(919) 735-6121

March 31, 1993

Certification No. P364 761820

Oriental Jade Restaurant
2102 N. Highway 117 Bypass
Goldsboro, NC 27530

Dear Sir(s):

Thank you for the time you took to discuss the grease problem at your restaurant. As I told you at the time of our discussion, this is the second time in two years that our sanitation department has had to clean out a large section of sewer pipe where your building connects to our sewer main.

I do not know how the grease is getting through, but the fact is that it is getting through. Therefore, I must insist that you obtain a licensed plumber to install a grease trap that will be of sufficient size and gallon per minute to protect our sewer. The fixtures that will need to be put on the grease trap must include: the dishwasher, the pots and pan sink, any floor drains that might receive wash down from the cooking area and the can wash.

As is customary, we will allow you thirty (30) days from the date of receipt of this letter to get the equipment installed. It is hoped that you will comply with this letter and further action can be avoided.

If I can be of further assistance, please do not hesitate to contact me by calling 580-4389. My office hours are from 8:00 a.m. – 9:30 a.m. and from 4:00 p.m. – 5:00 p.m. Monday through Friday.

Yours truly,

/s/ John N. Hales
Plumbing/Mechanical Inspector

JNH:jg
cc: Floyd McKeel, Chief Inspector

Exhibit "B"

City of Goldsboro
P. O. Drawer A
North Carolina
27533-9701

December 3, 1993

(919) 735-6121

Certification No. P375 015124

Mr. Tseng Fu Lin
Oriental Jade Restaurant
2102 N. Highway 117 Bypass
Goldsboro, NC 27530

Dear Mr. Lin:

The City Manager has asked that I write you concerning the reasons the Inspections Division of the City of Goldsboro has required that a grease interceptor be installed at your restaurant located at 2102 North Highway 117 Bypass.

I refer you to a certified letter dated March 31, 1993 from John Hales, Plumbing/Mechanical Inspector for the City of Goldsboro, a copy of which is attached hereto. I believe this letter fully explains the Inspections Division's position concerning installation of a grease interceptor.

If I may summarize, the City's Maintenance Division has been called to your restaurant on two occasions in order to clean out a section of sanitary pipe which was clogged with grease. Since your restaurant is the first customer connected to the sanitary sewer main, the origin of the grease can only be attributed to your facility. In March, 1993, the Inspections Division requested that a licensed plumber install a grease interceptor of sufficient size and gallons per minute in order to protect the City of Goldsboro's sanitary sewer system. You were subsequently granted 30 days from the date of receipt of the March 31, 1993 letter in order to comply with this directive.

As of this date, a grease interceptor has not been installed at the Oriental Jade Restaurant. The City of Goldsboro has the authority under the North Carolina State Plumbing Code to mandate this requirement. I refer to Chapter 8, Section 801-4 entitled "Grease Interceptors" of the State Plumbing Code which states, in part, that:

> "A grease interceptor shall be installed in the waste line leading from sinks, drains or other fixtures in the following establishments when, in the opinion of the Plumbing Official, a hazard exists: restaurants, hotel kitchens or bars, factory cafeterias or restaurants, clubs, or other uses where grease can be introduced into the

drainage system in quantities that can affect line stoppage or hinder sewage disposal."

The City of Goldsboro has performed a considerable amount of maintenance on the sanitary sewer line coming into your establishment. I must advise you that, until such time a grease interceptor is installed at this location in compliance with the State Plumbing Code, authorization will not be forthcoming for permission to connect to water, sanitary sewer or electrical service. The system that currently exists at this restaurant is not achieving its intended purpose. A grease interceptor must be installed in order to meet City sanitary sewer standards.

I am asking for your cooperation in this matter. If you have any questions or if I can be of assistance, you may contact me at 580-4346.

Yours truly,

/s/ Floyd McKeel
Chief Inspector

FM/RMS/ssj

Attachment

Exhibit "C"

City of Goldsboro
P. O. Drawer A
North Carolina
27533-9701

December 15, 1993
(919) 735-6121

Mr. Tseng Fu Lin
2102 N. Highway 117 Bypass
Goldsboro, NC 27530

Dear Mr. Lin:

This letter is to advise you that failure on your part to install a grease trap at your restaurant, known as Oriental Jade, located at the above mentioned address, by 12:00 p.m. Thursday, December 16, 1993, this office will have no alternative but to have your water service disconnected.

You have been given ample opportunity to meet the requirements of the State Building Code and the City Ordinance requiring you to have a grease trap installed. The first notice was mailed to you in March 31, 1993. You have not, as of this date, complied with our request. Therefore, failure on your part to comply with this notice will result in the water service being terminated.

Asking for your cooperation in this matter. If you have any questions, please contact me by calling 580-4346.

Sincerely,

/s/ Floyd McKeel

FM:

/s/ Acknowledgment of Receival
Mr. Tseng Lin or Authorized Representative

/s/ R. D. Roscoe
Officer, Goldsboro Police Department

December 15, 1993, 11:12 a.m.
Date and Time of Delivery

FILED: November 30, 1994, 3:06 p.m., Wayne County Clerk of Superior Court

NORTH CAROLINA
WAYNE COUNTY

TSENG FU LIN d/b/a ORIENTAL JADE RESTAURANT,
Plaintiff,

vs.

CITY OF GOLDSBORO, FLOYD M. McKEEL, agent, and CHARLES R. SOUTHERLAND, agent
Defendants.

IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
FILE NO.: 94 CVS 860

AFFIDAVIT OF JOHN N. HALES

NOW COMES, John N. Hales, being duly sworn, depose and say:

1. That I am over eighteen years of age, and I am competent to make the statements contained in this Affidavit.

2. Except for matters and facts which are stated expressly upon the bases of information which I believe is true, the statements and facts contained in this Affidavit are based upon my own personal knowledge and experience.

3. That I am employed by the City of Goldsboro as the Plumbing/Mechanical Inspector.

4. That the Plaintiff, Tseng Fu Lin, has complied with the City of Goldsboro's request to install a grease interceptor at 2102 North Highway 117 Bypass, Goldsboro, North Carolina, by installing a grease interceptor in July, 1994.

5. Further this affiant sayeth not.

This the 30th day of November, 1994.

/s/ John N. Hales

NORTH CAROLINA

WAYNE COUNTY

I, Cathleen D. Fink, a Notary Public in and for the aforesaid State and County, do hereby certify that John N. Hales personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

WITNESS my hand and notarial seal, this the 30th day of November, 1994.

/s/ Cathleen D. Fink
Notary Public

My Commission Expires: June 3, 1998

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the document in the above entitled action upon all other parties to this cause by

_____ Hand delivering a copy thereof to the attorney for each said party.

__X__ Depositing a copy hereof, postage pre-paid in the United States Mail, properly addressed to the attorney for each said party.

This 1st day of December, 1994.

/s/ L. Ashley Smith
For EVERETT, WOMBLE,
FINAN & RIDDLE

FILED: January 11, 1996, 11:28 a.m., Office of the Clerk, Supreme Court of North Carolina
No. 5P96 EIGHT-B DISTRICT

NORTH CAROLINA SUPREME COURT

****

TSENG FU LIN, d/b/a ORIENTAL JADE RESTAURANT, Plaintiff/Petitioner, v. CITY OF GOLDSBORO, FLOYD McKEEL, Agent, and CHARLES R. SOUTHERLAND, Defendants/Respondents.	COA 95-657 From Wayne County No. 94 CVS 860

RESPONSE TO PETITION FOR DISCRETIONARY REVIEW

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Respondents, the City of Goldsboro, Floyd McKeel, agent, and Charles R. Southerland, pursuant to Rule 15(d) of the North Carolina Rules of Appellate Procedure and N.C.G.S. § 7A-31, respectfully submit this response to Petitioner's Petition for Discretionary Review of the decision of the North Carolina Court of Appeals dated December 19, 1995, Case No. COA95-657, affirming the trial court's grant of summary judgment for Respondents.

Petitioner contends that review should be granted because this cause involves legal principals [sic] of major

significance to the jurisprudence of the State and Nation, and the decision of the Court of Appeals appears likely to be in conflict with decision of the North Carolina Supreme Court, United States Supreme Court, and North Carolina Court of Appeals.

In fact, the decision of the Court of Appeals affirming the trial court's grant of summary judgment for Respondents on the grounds of governmental immunity is firmly supported by the following legal authority:

1. *Metz v. Asheville*, 150 N.C. 748, 64 S.E. 881 (1909)

2. *Lonon v. Talbert*, 103 N.C. App. 686, 691, 407 S.E.2d 276, 280 (1991)

3. North Carolina General Statutes Sections 160A-174, 143-139

4. Goldsboro City Ordinance Section [sic] 25-37

5. North Carolina Plumbing Code, Volume 2, Chapter 8, Section 801.4

The Court of Appeals also rejected Petitioner's contention that the City of Goldsboro Ordinance permitting the actions taken by Respondents' agents violated his constitutional right to due process. This conclusion is firmly supported and controlled by your holding in *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

Finally, Petitioner's contention in his Petition that Respondents' actions constituted an "inverse condemnation without due process of law and just compensation" was not made to nor considered by the Court of Appeals

and should not be considered by this Court in determining whether to grant certiorari.

Accordingly, Respondents respectfully request that this Court deny Petitioner's Petition for Discretionary Review.

Respectfully submitted this the 10th day of January, 1995.

EVERETT, WOMBLE, FINAN & RIDDLE

/s/ W. Harrell Everett, Jr.
Attorney for Respondents
P. O. Drawer 10809
Goldsboro, NC 27532-0809
(919) 778-6707
N.C. State Bar No. 1388

/s/ Stacey L. Fuller
Attorney for Respondents
P. O. Drawer 10809
Goldsboro, NC 27532-0809
(919) 778-6707
N.C. State Bar No. 21752

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of this Response to Petition for Discretionary Review has this day been served upon the Plaintiff-Petitioner by mailing a copy of the same to his Counsel of Record, Robert E. Fuller, Jr., sent in the United States mail, postpaid to his address, P.O. Box 1121, Goldsboro, NC 27533-1121, this the 10th day of January, 1996.

EVERETT, WOMBLE,
FINAN & RIDDLE

/s/ Stacey L. Fuller
Attorney for Respondents
P. O. Drawer 10809
Goldsboro, NC 27532-0809
(919) 778-6707
N.C. State Bar No.: 21752

Goldsboro Code of Ordinances § 25-35. Permit revocation.

All permits to connect with the city water and sewer systems shall be given upon the condition that the city engineer may at any time, before the completion of the connection, revoke and annul the permit when the work is not being properly executed. No party interested shall have a claim for damage in consequence of such permit being revoked or annulled. (Ord. No. 1982-47, § 2, 10-4-82)

Goldsboro Code of Ordinances § 25-35

Goldsboro Code of Ordinances § 25-37. City engineer to grant permit, cause service lines to be laid; ownership of service lines; revocation of permit, etc.

The city engineer may grant such permit and shall cause suitable water service lines to be laid from the main water line to and including the curb stop, which shall be located near the abutting property line, and be provided with a suitable meter box. Ownership of the service line from main line to meter box lines with the property owners. The work of furnishing and laying the line up to and including the curb stop shall be performed by the city maintenance superintendent and paid for in advance by the property owner, including replacement tap. The applicant shall furnish and lay the balance of the water service line at his own expense, subject, however, to the supervision and director of the plumbing inspector. Such water service lines shall be laid to the depth of the bottom of the main water line, unless otherwise permitted by the plumbing inspector, and shall, when required by the city, be covered with at least eighteen (18) inches of some approved material to protect the water service line from frost. All water and sewer service lines shall be as specified in the North Carolina Plumbing Code, Volume II, and as approved by the plumbing inspector. Backflow prevention devices shall be installed where directed by the plumbing inspector. If the applicant, in putting in any service lines from the property line to his structure, disregards the director of the city engineer, maintenance superintendent or plumbing inspector in any particular, the permit granted for the use of water

may be revoked by the city engineer and the tap fee forfeited to the city. (Ord. No. 1982-47, § 2, 10-4-82)

Goldsboro Code of Ordinances § 25-37.

N.C.G.S. § 143-139 *Enforcement of Building Code*

(a) Procedural Requirements. – Subject to the provisions set forth herein, the Building Code Council shall adopt such procedural requirements in the North Carolina State Building Code as shall appear reasonably necessary for adequate enforcement of the Code while safeguarding the rights of persons subject to the Code.

(b) General Building Regulations. – The Insurance Commissioner shall have general supervision, through the Division of Engineering of the Department of Insurance of the administration and enforcement of all sections of the North Carolina State Building code pertaining to plumbing, electrical systems, general building restrictions and regulations, heating and air conditioning, fire protection, and the construction of buildings generally, except those sections of the Code, the enforcement of which is specifically allocated to other agencies by subsections (c) and (d) below. The Insurance Commissioner by means of the Division of Engineering, shall exercise his duties in the enforcement of the North Carolina State Building Code (including local building codes which have superseded the State Building Code in a particular political subdivision pursuant to G.S. 143-138(e)) in cooperation with local officials and local inspectors duly appointed by the governing body of any municipality or board of county commissioners pursuant to Part 5 of Article 19 of Chapter 160A of the General Statutes or Part 4 of Article 18 of Chapter 153A of the General Statutes, or other applicable statutory authority.

(b1) Remedies. – In case any building or structure is maintained, erected, constructed, or reconstructed or its

purpose altered, so that it becomes in violation of this Article or of the North Carolina State Building Code, either the local enforcement officer or the State Commissioner of Insurance or other State official with responsibility under this section may, in addition to other remedies, institute any appropriate action or proceeding to: (i) prevent the unlawful maintenance, erection, construction, or reconstruction or alteration of purpose, or overcrowding, (ii) restrain, correct, or abate the violation, or (iii) prevent the occupancy or use of the building, structure, or land until the violation is corrected. In addition to the civil remedies set out in G.S. 160A-175 and G.S. 153A-123, a county, city, or other political subdivision authorized to enforce the North Carolina Building Code within its jurisdiction may, for the purposes states in (i) through (iii) of this subsection, levy a civil penalty for violation of the fire prevention code of the North Carolina State Building Code, which penalty may be recovered in a civil action in the nature of debt if the offender does not pay the penalty within a prescribed period to time after the offender has been cited for the violation. If the Commissioner or other State official institutes an action or proceeding under this section, a county, city or other political subdivision may not institute a civil action under this section based upon the same violation. Appeals from the imposition of any remedy set forth herein, including the imposition of a civil penalty by a county, city, or other political subdivision, shall be as provided in G.S. 160A-434.

(c) Boilers. – The Bureau of Boiler Inspection of the Department of Labor shall have general supervision of the administration and enforcement of those sections of

the North Carolina State Building Code which pertain to boilers of the types enumerated in Article 7 of Chapter 95 of the General Statutes.

(d) Elevators. – The Department of Labor shall have general supervision of the administration and enforcement of those sections of the North Carolina State Building Code which pertain to elevators, moving stairways, and amusement devices such as merry-go-rounds, roller coasters, Ferris wheels, etc. (1957, c. 1138; 1963, c. 811; 1989, c. 681, s. 11; 1993, c. 329, s. 2.)

N.C.G.S. § 143-139

N.C.G.S. § 160A-174. *General ordinance – making power.*

(a) A city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances.

(b) A city ordinance shall be consistent with the Constitution and laws of North Carolina and the United States. An ordinance is not consistent with State or federal laws when:

(1) The ordinance infringes a liberty guaranteed to the people by the State or federal Constitution;

(2) The ordinance makes unlawful an act, omission or condition which is expressly made lawful by State or federal law;

(3) The ordinance makes lawful an act, omission, or condition which is expressly made unlawful by State or federal law;

(4) The ordinance purports to regulate a subject that cites [sic] are expressly forbidden to regulate by State or federal law;

(5) The ordinance purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation;

(6) The elements of an offense defined by a city ordinance are identical to the elements of an offense defined by State or federal law.

The fact that a State or federal law, standing along, [sic] makes a given act, omission, or condition unlawful shall not preclude city ordinances requiring a higher standard of conduct or condition. (1971, c. 698, s. 1.)

N.C.G.S. § 160A-174

N.C.G.S. § 160A-311. *Public enterprise defined.*

As used in this Article, the term "public enterprise" includes:

(1) Electric power generation, transmission, and distribution systems;

(2) Water supply and distribution systems;

(3) Wastewater collection, treatment, and disposal systems of all types, including septic tank systems or other on-site collection or disposal facilities or systems;

(4) Gas production, storage, transmission, and distribution systems, where systems shall also include the purchase and/or lease of natural gas fields and natural gas reserves, the purchase of natural gas supplies, and the surveying, drilling and any other activities related to the exploration for natural gas, whether within the State or without;

(5) Public transportation systems;

(6) Solid waste collection and disposal systems and facilities;

(7) Cable television systems;

(8) Off-street parking facilities and systems;

(9) Airports;

(10) Structural and natural stormwater and drainage systems of all types. (1971, c. 698, s. 1; 1975, c. 549, s. 2; c. 821, s. 3; 1977, c. 514, s. 2; 1979, c. 619, s. 2; 1989, c. 643, s. 5; 1991 (Reg. Sess., 1992), c. 944, s. 14.)

N.C.G.S. § 160A-311

N.C.G.S. § 160A-312. *Authority to operate public enterprises.*

(a) A city shall have authority to acquire, construct, establish, enlarge, improve, maintain, own, operate, and contract for the operation of any or all of the public enterprises as defined in this Article to furnish services to the city and its citizens. Subject to Part 2 of this Article, a city may acquire, construct, establish, enlarge, improve, maintain, own, and operate any public enterprise outside its corporate limits, within reasonable limitations, but in no case shall a city by [sic] held liable for damages to those outside the corporate limits for failure to furnish any public enterprise service.

(b) A city shall have full authority to protect and regulate any public enterprise system belonging to or operated by it by adequate and reasonable rules. The rules shall be adopted by ordinance, shall apply to the public enterprise system both within and outside the corporate limits of the city, and may be enforced with the remedies available under any provision of law.

(c) A city may operate that part of a gas system involving the purchase and/or lease or natural gas fields, natural gas reserves and natural gas supplies and the surveying, drilling or any other activities related to the exploration for natural gas, in a partnership or joint venture arrangement with natural gas utilities and private enterprise. (1971, c. 698, s. 1; 1973, c. 426, s. 51; 1975, c. 821, s. 5; 1979, 2nd Sess., c. 1247, s. 29; 1991 (Reg. Sess., 1992), c. 836, s. 1.)

N.C.G.S. § 160A-312

N.C.G.S. § 160A-411. *Inspection Department.*

Every city in the State is hereby authorized to create an inspection department, and may appoint one or more inspectors who may be given the titles of building inspector, electrical inspector, plumbing inspector, housing inspector, zoning inspector, heating and air-conditioning inspector, five [sic] prevention inspector, or deputy or assistant inspector, or such other titles as may be generally descriptive of the duties assigned. The department may be headed by a superintendent or director of inspections. Every city shall perform the duties and responsibilities set forth in G.S. 160A-412 either by: (I) creating its own inspection department; (ii) creating a joint inspection department in cooperation with one or more other units of local government, pursuant to G.S. 106A-413 or Part 1 of Article 20 of this Chapter; (iii) contracting with another unit of local government for the provision of inspection services pursuant to Part 1 of Article 20 of this Chapter; or (iv) arranging for the county in which it is located to perform inspection services within the city's jurisdiction as authorized by G.S. 160A-413 and G.S. 160A-360. Such action shall be taken no later than the applicable date in the schedule below, according to the city's population as published in the 1970 United States Census:

Cities over 75,000 population – July 1, 1979

Cities between 50,001 and 75,000 – July 1, 1981

Cities between 25,001 and 50,000 – July 1, 1983

Cities 25,000 and under – July 1, 1985.

In the event that any city shall fail to provide inspection services by the date specified above or shall cease to provide such services at any time thereafter, the Commissioner of Insurance shall arrange for the provision of such services, either through personnel employed by his department or through an arrangement with other units of government. In either event, the Commissioner shall have any [sic] may exercise within the city's jurisdiction all powers made available to the city council with respect to building inspection under Part 5 of Article 19, and Part 1 of Article 20 of this Chapter. Whenever the Commissioner has intervened in this manner, the city may assume provision of inspection services only after giving the Commissioner two years' written notice of its intention to do so; provided, however, that the Commissioner may waive this requirement or permit assumption at an earlier date if he finds that such earlier assumption will not unduly interfere with arrangements he has made for the provision of those services. (1969, c. 1065, s. 1; 1971, c. 698, s. 1; 1977, c. 531, s. 5.)

N.C.G.S. § 160A-411

North Carolina State Plumbing Code (1991)

Chapter 8: Interceptors, Separators and Backwater Valves

§ 801.1 When Required

Interceptors or separators shall be provided when, in the opinion of the Plumbing Official, they are necessary for the proper handling of wastes containing ingredients harmful to the building drainage system, the public sewer, or sewage treatment plant or processes.

§ 801.4 Grease Interceptors

A grease interceptor shall be installed in the waste line leading from sinks, drains or other fixtures in the following establishments when, in the opinion of the Plumbing Official, a hazard exists; restaurants, hotel kitchens or bars, factory cafeterias or restaurants, clubs, or other uses where grease can be introduced into the drainage system in quantities that can affect line stoppage or hinder sewage disposal.

North Carolina Plumbing Code, Volume 2, Ch. 8, §§ 801.1, 801.4 (1991)